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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 402

KAISER COMPANY, INC. and HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellants,

vs.

REUBEN FRANKLIN RASKIN, by His Guardian Ad Litem and Trustee, CATHERINE DUNN, and INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA,

Appellees.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court of Appeal, entered in this cause.

Opinion Below

The first opinion of the District Court of Appeal of the State of California, First Appellate District, Division 2, is reported at 89 Cal. App. 2d 632, 201 P. 2d 549. Upon a petition for a writ of certiorari filed by the present appellee Baskin, the Supreme Court without argument vacated the judgment on the foregoing opinion and remanded the cause for further consideration. No. 224, October Term, 1949, 338 U. S. 854, 94 L. Ed. Adv. Op. 62. The second opinion of the District Court of Appeal, from which this appeal is taken, is reported in 97 Adv. Cal. App. 2d 301, 217 P. 2d 733. Appellants' petition for hearing in the California Supreme Court was denied on June 26, 1950, without opinion. 35 Adv. Cal. No. 15, Minutes, p. 1. Copies of the first opinion of the District Court of Appeal, of the *per curiam* opinions of the Supreme Court, and of the second opinion of the District Court of Appeal, are annexed hereto as Appendices A, B and C respectively.

Question Presented

Where a workman employed in a shipyard sustained injury aboard a commissioned vessel in active maritime service on navigable waters while engaged in repairing such vessel, can a state legislature, in view of Article III, Section 2, of the Constitution of the United States, conferring jurisdiction of admiralty causes upon the courts of the United States, as construed in the line of cases extending from *Southern Pacific Company* v. *Jensen,* 244 U. S. 205, 61 L. Ed. 1086 (1917) to *Davis* v. *Department of Labor,* 317 U. S. 249, 87 L. Ed. 246 (1942), and *Bethlehem Steel Co.* v. *Moore,* 335 U. S. 874, 93 L. Ed. 417 (1948), fix the compensation for the injury in a manner different from that provided by Congress in the Longshoremen's and Harbor

Workers' Compensation Act of 1927, 33 U. S. C. Sections 901-950.

Jurisdiction

Provision of the Judicial Code Conferring Jurisdiction.—The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2), relating to final judgments where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

State Statute, the Validity of Which Is Drawn in Question.—The statute of the State of California, the validity of which is involved, is the California Workmen's Compensation Act, Deering's Labor Code, Sections 3201-6149.

The statute provides a comprehensive system of workmen's compensation insurance. The act extends to every person in the service of an "employer" (Sections 3600 and 3351), and every person which has any natural person in service is an "employer" (Section 3300). Maritime service is not excluded. Compare Section 3352.

Copies of Sections 3300, 3351, 3352 and 3600 are attached as Appendix D.

The constitutionality of the application of the statute in the circumstances of this case is drawn in question.

Manner in Which Federal Question Was Raised and Decided.—Appellants' contention that Baskin's injuries were within the exclusive admiralty jurisdiction of the United States was presented before the Industrial Accident Commission by appellants' Answer to Supplement to Baskin's Application of June 30, 1947, for adjustment of claim. Paragraph IV of said Answer read:

> "Further answering the application for adjustment of claim and said supplement application, defendants

> allege that Industrial Accident Commission is without jurisdiction of the subject matter or parties to this procedure, and that the attempt to assert jurisdiction is in violation of Section 2, Article 3, of the Constitution of the United States, wherein all cases of admiralty and maritime jurisdiction are within the judicial power of the United States and further that the attempted assertion of jurisdiction by the Industrial Accident Commission of California is contrary to and in violation of the provisions of Section 3 (a) of the Longshoremen's and Harbor Workers' Act (Section 903 (a), 33 U. S. Code) and of Section 5 of the Longshoremen's and Harbor Workers' Act (Section 905, 33 U. S. Code)."

In its Order of Dismissal, filed March 31, 1948, the Industrial Accident Commission ruled:

> "The claim asserted herein is within the exclusive admiralty jurisdiction of the Federal government and therefore outside the scope of jurisdiction of the California Industrial Accident Commission."

The same contention was presented in appellants' answer to Baskin's petition for a writ of review before the District Court of Appeal.

In its first opinion (89 Cal. App. 2d 632, 633, 201 P. 2d 549, 550, Appendix A, page iii), the District Court of Appeal, quoting the contentions of Baskin, said:

> " 'Only if the state could not constitutionally provide compensation for petitioner's injuries, may the order of respondent Commission be sustained.' "

After reviewing the authorities on this question, the District Court of Appeal affirmed the Order of the Commission.

The same issue was presented to the Supreme Court on Baskin's petition for certiorari. The order of the Supreme Court vacating the opinion of the District Court of Appeal and remanding the cause for further consideration appears to be a determination that a federal question was involved.

Upon remand of the case, appellants again filed a brief in support of their contention that "where maritime employment and maritime injury concur, the state workmen's compensation laws may not intrude . . ." Brief of Respondents Kaiser Company, Inc., and Hartford Accident & Indemnity Company on Vacation of Judgment and Remand for Reconsideration, page 10.) The question was again considered by the District Court of Appeal, which again stated the point involved to be that only if the state could not constitutionally provide compensation for Baskin's injuries, might the order of the Commission be sustained. 97 Adv. Cal. App. 2d 301, 303, 217 P. 2d 733, 735, Appendix C, page iii. This time, however, the District Court of Appeal sustained the constitutionality of the California Workmen's Compensation Act as applied to this injury and annulled the order of the Industrial Accident Commission, with a direction to proceed with a hearing and determination of petitioner's application. 97 Adv. Cal. App. 2d at 307, 217 P. 2d at 738, Appendix C, page xi.

Appellants applied to the Supreme Court of California for hearing of the cause on the ground, among others, that the decision of the District Court of Appeal decides a point of Federal constitutional law in a manner contrary to Article III, Section 2, of the Constitution of the United States and the applicable decisions of the United States Supreme Court, in that it applies the state workmen's compensation law in a case within the exclusive admiralty jurisdiction covered by the Federal Longshoremen's and Harbor Workers' Act. (Petition of Kaiser Company, Inc. and Hartford Accident & Indemnity Company for a Hearing by the Supreme Court, dated June 7, 1950, page 2.)

The California Supreme Court denied the petition for a hearing.

Finality of Judgment.—The decision of the District Court of Appeal upon the writ of review, overruling appellants' contention that the Industrial Accident Commission was without jurisdiction and directing the Commission to proceed to an award, is in substantial effect a judgment denying a writ of prohibition and granting a writ of mandamus. These judgments are final. *Denver & Rio Grande Western R. Co.* v. *Terte,* 284 U. S. 284, 76 L. Ed. 295 (1932) (denial of prohibition); *Missouri ex rel. St. Louis B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200, 69 L. Ed. 247 (1924) (denial of prohibition); *Hartman* v. *Greenhow,* 102 U. S. 672, 26 L. Ed. 271 (1880) (mandamus denied); *Detroit & Mackinaw Ry. Co.* v. *Michigan Ry. Comm.,* 240 U. S. 564, 60 L. Ed. 802 (1916) (mandamus allowed).

The Industrial Accident Commission, on September 13, 1950, held a hearing pursuant to the order of the District Court of Appeal. The appellants anticipate that an award will be entered and a hearing had in the Supreme Court of California in time to docket an appeal from the order thereon concurrently with this appeal, should the order of the California Supreme Court be adverse to the present appellants. Any question as to which of the two orders is the "final" order can then be determined without affecting appellants' substantive rights.

Timeliness of Appeal.—The judgment of the District Court of Appeal was entered on April 28, 1950, and a petition for rehearing was denied May 27, 1950. The Supreme Court of California denied appellants' petition for a hearing on June 26, 1950. The petition for appeal is presented to the presiding judge of the District Court of Appeal herewith, namely, on September 22, 1950. The petition, being presented within 90 days of the denial of a hearing by the Supreme Court, is timely. 28 U. S. C. Secs. 1257, 2101(c), *American Railway Express Co.* v. *Levee,* 263

U. S. 19, 20-21, 68 L. Ed. 140, 143 (1923); Robertson and Kirkham, Jurisdiction of the Supreme Court (1936) Section 353, page 720.

Statement

Sometime prior to December 10, 1945, the appellant Kaiser Company, Inc., hired R. F. Baskin as a joiner-materialman at its shipyard at Richmond, California. His duties consisted for the most part in moving materials from warehouses to vessels under construction.

The SS WILLIAM MOULTRIE was a commissioned vessel in active maritime service. On December 10, 1945, she was undergoing repairs at the Richmond yard. According to the testimony of applicant's witness Entwistle, she was the farthest out of three ships moored side by side at the shipyard dock. The repairs consisted in replacing some worn out or broken planks at the bottom and sides of the hold. After the work was completed in No. 5 hold, some surplus planks were left over. These were to be moved to the No. 4 hold for use there. The crane on the dock was too far away to handle these planks, and the ship's winches could not be used because the ship had no steam. Therefore the planks had to be moved by hand. Baskin was one of several men sent aboard the ship for this purpose.

About 20 or 30 minutes after Baskin was sent aboard the MOULTRIE, he fell into a hold and sustained serious injury.

Deputy Commissioner Pillsbury testified that (as required by the Federal Longshoremen's and Harbor Workers' Act (33 U. S. C. Sections 914(c), 930)) the appellants reported the accident to the United States Employees' Compensation Commission on December 17, 1945; filed medical reports, dated from December 12, 1945, to January 21, 1947; and on December 26, 1945, reported commencement of payments under the federal act.

Mrs. Catherine Dunn, Baskin's sister and his guardian *ad litem* for purposes of this litigation, visited Mr. Pillsbury a short time after the injury with a representative of Hartford. They inquired whether a lump sum could be granted to enable her or Baskin's mother to build a $5,000 home in which Baskin and his mother could live and in which his mother could take care of him. Mr. Pillsbury told the parties that he thought the showing was not good for a lump sum payment, as there was no assurance that Baskin would have money to live on if his weekly payments were teminated.

This visit preceded Mrs. Dunn's appointment as guardian *ad litem*. After Mr. Pillsbury had advised Mrs. Dunn that he would not approve a lump sum payment, proceedings were instituted for the recovery of compensation under the California state act.

As stated above, the Industrial Accident Commission dismissed Baskin's application for adjustment of claim for want of jurisdiction. The District Court of Appeal at first denied an application for a writ of review. The Supreme Court, on petition for certiorari, vacated this decision of the District Court of Appeal, and the latter court, on remand, annulled the order of the Industrial Accident Commission by the decision here appealed from.

The Questions Are Substantial

1. On the decisions of this court prior to 1942, the state act clearly could not be applied.

The basis of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 61 L. Ed. 1086 (1917), is that a single system of federal law must govern employees' injuries within the admiralty and maritime jurisdiction conferred by Article III, Section 2, of the Constitution of the United States.

There are two basic grounds of jurisdiction in workmen's compensation cases: Jurisdiction of the place of injury and jurisdiction of the contract of employment. The Jensen doctrine has no application where the injury is on shore, since admiralty has no jurisdiction of torts occurring on land, and the application of a state act to an injury outside maritime jurisdiction would not come into conflict with any superior maritime law. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, 66 L. Ed. 933 (1922).

Likewise, where the employment is non-maritime, the application of a state workmen's compensation law can be sustained on the ground that it occasions no prejudice to maritime law for a state to annex to non-maritime employment an insurance liability in place of the ordinary liability for negligence. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 66 L. Ed. 321 (1922).

In deciding whether employment is maritime or non-maritime, the rule is that the question is determined by the work the employee is doing at the moment of his injury, and not by appraising the dominant character of the entire employment relation. *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142, 73 L. Ed. 232 (1928); *Employees' Liability Assurance Corp.* v. *Cook*, 281 U. S. 233, 74 L. Ed. 823 (1930). Citing these two cases, which dealt with State acts, the Supreme Court applied the Federal Longshoremen's and Harbor Workers' Compensation Act to the death of a janitor-porter employed by a dealer in small boats. The decedent, whose general instructions were not to go into a boat, was drowned while accompanying another employee on a boat trip to test an outboard motor. *Parker* v. *Motor Boat Sales Inc.*, 314 U. S. 244, 86 L. Ed. 184 (1941). The court said: "For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river,

and it is in connection with that clearly maritime activity that the award was here made." 314 U. S. at 247, 86 L. Ed. at 189.

The foregoing decisions leave no doubt whatever as to whether Baskin's injury was compensable under the state or federal act. The Industrial Accident Commission did not even attempt to assert jurisdiction here; once a hearing had established the facts, the Commission dismissed the application for want of jurisdiction. The District Court of Appeal sustained the Commission in an opinion which is, on the foregoing precedents, unanswerable.

2. Counsel for Baskin have relied upon *Davis* v. *Department of Labor*, 317 U. S. 249, 87 L. Ed. 246 (1942), and *Bethlehem Steel Co.* v. *Moore*, 335 U. S. 784, 93 L. Ed. 417 (1948). The doctrine of the Davis case is that where the injury falls in a twilight zone between clear applicability of the federal act and clear applicability of the state act, the workman will be held entitled to recovery under whichever act he elects. The decedent in the *Davis* case was employed in demolishing a bridge. His work included cutting steel from the bridge with an oxyacetylene torch; the steel was then loaded from the bridge by a derrick barge to another barge, for transportation to shore. The decedent worked on this second barge to cut the pieces to proper lengths.

Bethlehem Steel Co. v. *Moore*, 335 U. S. 874, 93 L. Ed. 417 (1948), in which the Supreme Court wrote no opinion, was another shipyard case. The vessel had been very seriously damaged by an explosion; she spent approximately six months in the shipyard; and she was in drydock at the time of the injury. The duty of the injured employee was to give directions to an operator of a crane situated on shore. He stepped aboard the vessel while she was in

drydock in order to be in a somewhat better position to direct the crane operator.

Both of these cases involved a preliminary question as to whether the particular employment of the decedent was maritime or non-maritime. The broad definition of a maritime contract is a contract relating to a ship in its use as such or to commerce on navigable waters. 1 Benedict on Admiralty (6th ed. 1940) Sec. 64, page 130. In the *Davis* case, the workman was employed to cut down a bridge—a non-maritime activity—and as part of that job he had to cut the span in pieces small enough to be hauled ashore. There were no underlying legal principles for giving any sure guidance in determining whether the law would recognize a division of a wrecker's work between the wrecking and quasi-stevedoring functions. The case clearly lay in a twilight zone.

The doubt in the *Moore* case likewise arose from the question of whether the workman's employment was maritime or not. The question of degree was whether the work on the vessel amounted to mere repairs or to a reconstruction of the ship. Ship construction is a non-maritime activity; ship repair is maritime. *New Bedford Dry Dock Co.* v. *Purdy*, 258 U. S. 96, 66 L. Ed. 482 (1922). The Supreme Judicial Court of Massachusetts described the *Moore* case as similar to *DeGraw* v. *Todd Shipyards Corp.*, 134 N. J. L. 315, 47 A. 2d 338 (1946), cert. denied 329 U. S. 759, 91 L. Ed. 655 (1946), and *Emmons* v. *Pacific Indemnity Co.*, 208 S. W. 2d 884 (Texas 1948). In both of these cases the work being done on the vessel was held to exceed repair work. It is certainly open to argument that six months' work in reconstructing a vessel after explosion damage falls within the class of reconstruction rather than repair. This is again a question of degree upon which established rules of law shed little light. The *New Bedford Dry Dock* case, *supra*,

relied on by the Massachusetts court for its statement that, apart from the Davis case, it would find the work in question to be ship repair work and the employment non-maritime, was obviously influenced by a desire to extend the repair concept to its limit in aid of a broad construction of a remedial Federal lien statute.

In the present case, Baskin's employment at the time of his injury was not within any doubtful area between ship repair and ship construction work. The replacement of the planks in the bottom and on the sides of the ship's hold was a job that did not even require drydocking the vessel. No one in the case has contended that the work exceeded ordinary ship repairs.

If the work was merely ship repair work, the decision below can be supported only by doing away with the established rule, reiterated in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 86 L. Ed. 184 (1941), that the work the injured man is doing at the time of the injury is controlling, and not the dominant character of his general employment. Any test based on the dominant character of the employment or the "casual" nature of the work being done at the time of injury would contravene the basic purpose of the *Davis* case to end confusion in this field. It would raise questions as to whether the nature of the work continues to govern if it constitutes a "substantial" part of the worker's employment—5%, 10%, 20% or 49%. It would raise questions as to how one measures the "dominant" or "casual" character of employment—by the highest skill involved, by the total amount of time worked, by the wages received, by the choice of the workman, or by the title by which the employee is carried on the payroll. In the *Davis* case this court made the following observation:

> "We are not asked here to reconsider the constitutional implications of the Jensen line of decision.

> On the contrary even the petitioner argues that such action might bring about still worse confusion in an already uncertain field, and points out that state and federal agencies have made real progress toward closing the gap. There is much force in this argument." 317 U. S. at 255; 87 L. Ed. at 250.

It is difficult to suggest a decision which would go farther to bring about confusion and to undo progress in "closing the gap" than a decision that the choice of remedy turns upon the question of the general character of the workmen's employment. There are enough borderline cases already, with attention focused on the single question of whether the work being done at the time of injury was, or was not, maritime. There is no reason to superimpose upon this test a further question of degree to which nobody but an appellate court can give any answer.

3. The per curiam opinion in *Bethlehem Steel Co.* v. *Moore*, taken in conjunction with the remand of the present case to the District Court of Appeal, has given rise to doubt and confusion on the part of the workmen's compensation bar, reflected in the opinion of the District Court of Appeal in this case. The problem has been recently reviewed in a Note (1950) 2 Stanford L. Rev. 536, concluding with the observation that until "clarification (of the *Moore* and *Baskin* cases) is made claimants, employers, lawyers and the lower courts will be more in the dark than ever." 2 Stanford L. Rev. at 546.

The ultimate difficulty is that the rules governing decision of these cases have been well-nigh lost amid numerous judicial opinions where the writers tend to forget the principles and to decide cases by the comparison of isolated facts, unrelated by the relatively simple basic principles. The test of place of injury is straightforward and can give rise to litigation only in the most freakish cases. The

test of whether the employment was maritime gives rise to no difficulty in the overwhelming majority of cases; but there are, as illustrated by the *Davis* and *Moore* cases, a fair number of individual instances where the classification of the employment cannot readily be settled by reference to the books.

A more immediate cause of the difficulty is the language used in the opinion of the Supreme Judicial Court of Massachusetts in *Bethlehem Steel Co.* v. *Moore,* reported at 323 Mass. 462, 80 N. E. 2d 478. The Supreme Judicial Court thought the *Davis* case was "intended to be a revolutionary decision," giving "no rule or test other than the indefinable and subjective test of doubt." The Supreme Judicial Court thought that its "proper course is not to attempt to reason the matter through." Rather, it was "simply to recognize the futility of attempting to reason logically about 'illogic.' . . ."

The District Court of Appeal quoted the foregoing language at length. Then, assuming that the affirmance of the *Moore* decision by the Supreme Court indicated concurrence in such views, the District Court of Appeal went on to disregard the reasoning of its former opinion. Not only did the court find "no rule or test other than the indefinable and subjective test of doubt," but it apparently raised a synthetic doubt which had not existed so long as it was prepared to refer to the prior decisions of the Supreme Court.

The California court said: "It cannot be gainsaid that the facts in *Moore's* case and in *Baskin's* are very similar. In both instances the major part of the employee's work was on shore, and in both instances he was injured while working on a vessel in commission, in navigable waters, and *being repaired under a maritime contract.*" 97 Adv.

Cal. App. at 307, 217 P. (2d) at 737-8, Appendix C at xi. (Italics supplied.)

As a matter of fact, the key question in Moore's case, which properly placed the case within the twilight zone, was whether or not the work on the vessel amounted to repair work or to reconstruction of the ship. In Baskin's case there has been no question but that Baskin was doing maritime work in repairing the ship at the time of his injury; the alleged ground of doubt arises from the fact that he in general spent very little time on ships under repair. This contention could give rise to a doubt only if the twilight zone doctrine of the Davis case is to be administered by erasing from the books every decision of the Supreme Court since 1916 bearing on this point.

4. A number of commentators have suggested, and it has been argued by counsel for Baskin in this case, that the most important consideration in these cases is to give the injured workman a speedy and certain remedy, at his election if necessary, since the employer will ordinarily be protected by an insurance policy under the state workmen's compensation act with a longshoremen's endorsement, reducing the issue to a question of nothing more than how much and upon which theory an insurance company is to pay for the injury.

So far as we are advised, this line of argument has made its greatest impression upon lawyers whose special competence lies rather in the field of constitutional law than in insurance administration.

In the first place, the point was originally made in the Davis case as an answer to any suggestion that the resolution of genuinely doubtful cases on the basis of the employee's election would work a hardship on employers. It was not advanced as of itself a ground for giving an

employee an election between two statutes each of which is by its own terms an exclusive remedy. Indeed, it would be most unreasonable to use the mere existence of insurance protection as a ground for imposing upon either the employer or the insurance carrier a liability different from that specified by the legislative body having jurisdiction.

An election theory, even that provided by the rule of the *Davis* case, entails the difficulty that neither the Federal Longshoremen's and Harbor Workers' Compensation Act nor the ordinary state workmen's compensation act provides any machinery for an election by the employee. Both acts are expressly designed as exclusive of all other remedies; an election is not within the statutory scheme. Baskin's case was processed under the Federal Longshoremen's and Harbor Workers' Compensation Act and payments were made to him under that Act for months before he made any claim under the state act. Yet counsel for Baskin contend that neither these payments nor the informal application to the Deputy Commissioner by his sister for a lump sum settlement are sufficient to place the case conclusively under the Federal act. Instead, the authority of his sister to represent him is denied. If Baskin's counsel are right, the only way which we can see to procure an election is to refuse payment under either act and pay only under the compulsion of an administrative order, affirmed by the appropriate judicial proceeding for review, thus forcing the injured employee to make his election by litigation.

Such an election by litigation would be a desperate measure, both from the point of view of insurance carriers and from the point of view of injured workmen. The whole basis of workmen's compensation is that the need is a need at the moment of injury, when the employee's earning power is cut off and the need for medical care is pressing.

Any rule which would tend to increase the number of cases in which the payment of benefits must be postponed to litigation is not in the interests of employees.

Nor is it in the interest of insurance carriers. No insurance carrier desires to saddle an operation of this kind with heavy legal expense, nor do insurance carriers desire to impose upon administrative and supervisory employees of their assured the burden of preparing for and attending administrative hearings and judicial trials. From the point of view of the insurance carrier, the more of these cases that can be dealt with on a simple basis by claim adjusters, the better.

Unfortunately, an insurance carrier cannot reasonably be expected to wait indefinitely for a binding election on the part of an injured workman. There are variations between the statutory terms of state and federal acts which can make it to the workman's advantage to accept compensation under one statute if the injury appears temporary and under another statute if it appears permanent. Benefits allowed in cases of dismemberment may differ under the two types of statutes. Medical benefits are not identical. Statutes may differ in administration on such points as the way in which the administrative authorities will exercise their discretion in allowing or denying commutation of benefits to lump sum payments. An insurance carrier confronted with a twilight zone case is almost obliged to require an election at the outset; and if the only way a carrier can get an election is to require litigation, that has to be done. Even under the *Davis* case, therefore, every twilight zone case tends to be a litigated case, even though the object of litigation is to procure an election rather than to defeat the employee.

Baskin's case has become a matter of concern, not only to the insurance carrier in this case but also to the insur-

ance industry generally, because of the fact that the decision extends the twilight zone—and, consequently, the zone of litigation—beyond any visible limits. We may assume that the federal act will not be extended to situations where employers would not ordinarily be expected to insure under it; but we have no basis whatever for discerning any limits to the application of the state act in the field covered by the federal act. We cannot even tell what the governing factor in Baskin's case is. It may be that his case falls into the twilight zone because his maritime employment was, viewed against the background of his employment as a whole, exceptional. But this would be contrary to precedents cited above and reiterated as recently as *Parker* v. *Motor Boat Sales, Inc.*, and if these limitations upon the applicability of state acts are to be understood as overruled, it is hard to see any basis for handling claims upon the assumption that any other limitation survives. Another guess as to the possible basis of the decision is that the reference in the *Davis* case to "persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act" (317 U. S. at 256, 87 L. Ed. at 250), means that any maritime worker whose employer has a policy of insurance covering liability under the state act has an election of remedy. Very few employers of maritime workers do not also employ some non-maritime workers; even a steamship operator will have office clerical help covered under state acts. As a matter of actual administration, the employer is likely to procure one policy covering both non-maritime and maritime employees under the applicable acts, no matter how clear the line of distinction may be. If, therefore, an extreme interpretation of the quoted language is the moving force behind this decision, there is no such thing as a clear federal case.

Prior to the adoption of the twilight zone doctrine, real doubt as to which statute applied arose only in a minute percentage of the cases. There are, of course, many thousands of workmen's compensation claims in amphibious employment; and the instances in which litigation under the Jensen doctrine has arisen, though trivial in proportion to the number of claims, appear formidable when collected in legal annotations. But between 1917 and 1942 the Supreme Court laid out guides which removed all but the least handful of cases from the realm of doubt. Properly applied, the *Davis* case provides a relatively easy answer in the rare situations where the rules give no clear legal answer. But the disruptive consequences to the ordinary administration of workmen's compensation insurance of leaving in effect the legal caricature enunciated in the Moore opinion of the Supreme Judicial Court of Massachusetts, as extended and applied in this case by the District Court of Appeal, will work great and pointless injury to employees and insurance carriers alike.

Respectfully submitted,

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APPENDIX A

FIRST OPINION OF DISTRICT COURT OF APPEAL

Filed January 11, 1949

Civ. No. 13927

R. F. BASKIN, *Petitioner*,

vs.

INDUSTRIAL ACCIDENT COMMISSION, ET AL., *Respondents*

Opinion

GOODELL, *J.*:

This proceeding was brought to review an order of the commission which dismissed petitioner's application for compensation on the ground that the case is exclusively within federal jurisdiction.

Petitioner was a materialman employed from March, 1943, until December 10, 1945, by respondent Kaiser Company, Inc., at its Shipyard No. 3. His work during that time was entirely on shore (or on ships under construction) with the exception of two or three tours of short duration when he was sent to work aboard ships being repaired.

On December 10, 1945, the S. S. "William Moultrie" was undergoing repairs. She was one of three vessels tied up side by side at the shipyard wharf in San Francisco Bay and was the farthest out. A crane on the wharf moved materials from place to place on these ships. One of the holds on the "Moultrie" was being repaired. The crane's boom could not reach the planks already on board, to move them from one hold to another, and it became necessary to send men aboard to do so. Despite standing instructions that Baskin should not be sent aboard ships under repair, he was ordered onto the "Moultrie" to help, and while there fell down a hold and was seriously and permanently injured.

In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (44 Stats. 1424; 33 U. S. C. A. §§ 901-950). Section 902, subdivision 4, shows that the act covers persons "employed in maritime employ-

ment, in whole or in part, upon the navigable waters of the United States. . . ." Section 903(a) provides that "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . . and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ."

Petitioner contends that this language indicates that "Congress made clear its purpose to permit state compensation protection whenever possible . . ." (*Davis* v. *Department of Labor, etc.*, 317 U. S. 249, 252 [63 S. Ct. 225, 87 L. Ed. 246]), and states the question presented for decision as follows: "Only if the state could not constitutionally provide compensation for petitioner's injuries, may the order of respondent Commission be sustained."

It is well settled that ". . . contracts for the building of vessels or ships, or for labor performed, or materials furnished, in their construction, are *not* maritime contracts and *not* cognizable in admiralty, . . ." but that "*After a vessel has been completed and put in commission, contracts . . . to repair her . . . are maritime in their nature.* . . ." (1 Am. Jur., pp. 565-566; *New Bedford Dry Dock Co.* v. *Purdy*, 258 U. S. 96 [42 S. Ct. 243, 66 L. Ed. 482].) (Emphasis added.)

The "Moultrie" was in commission and undergoing repairs hence the work on her was being done under a maritime contract.

In developing their contention that this case is within the state and not the federal act, counsel for petitioner argue that Baskin was not a carpenter; that he did nothing by way of attaching or affixing lumber or other materials to the structure of the vessel, but was a mere helper carrying planks from one hold to another, where a skilled joiner was to make them a part of the ship. The answer to this is that he was just as much engaged in the performance of his employer's maritime contract as was the joiner who did the carpentry, albeit of humbler station.

With respect to the difference in status, noted above, between a ship under construction and a commissioned

ship under repair, petitioner points out that he was paid at two different rates, i. e., $1.20 an hour while on "new construction" and $1.34 while on repair work, and that on the day of his injury he was paid at the "new construction" rate. This is urged in aid of petitioner's broader point that his work was nonmaritime, local and predominantly on shore; that his infrequent assignments to ships under repair were of but a quarter-hour to an hour's duration, hence that his work on shipboard when injured was a mere deviation from his regular nonmaritime shore job, bringing the case within the *de minimis* rule.

Substantially the same argument was considered in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244 [62 S. Ct. 221, 86 L. Ed. 184], where the employee's duties were likewise habitually ashore. There the employee had been cautioned not to board the boats. He did so, however, and drowned. The court said: "This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Cf. *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142, 144, 73 L. Ed. 232, 234, 49 S. Ct. 88, 28 N.C.C.A. 18; *Employers' Liability Assur. Corp.* v. *Cook*, 281 U. S. 233, 236, 74 L. Ed. 823, 824, 50 S. Ct. 308. Moreover, sec. 2(4) of the Act, 33 U. S. C. A. sec. 902(4), expressly provides for its application to 'employees [who] are employed . . . in whole or *in part* upon the navigable waters of the United States.' "

In the Strand case, *supra*, the court said: "The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred." And in the Cook case, *supra*, it is said: "Whether Cook's employment contemplated that he should work regularly in unloading vessels or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out."

Ex parte Rosengrant, 213 Ala. 202 [104 So. 409] (affirmed without opinion in *Rosengrant etc.* v. *Havard*, 273 U.S. 664 [47 S. Ct. 454, 71 L. Ed. 829]), is also cited in support of the argument that Baskin was a land and not a sea employee and that his work was not maritime in character. Havard, a lumberyard employee, was checking lumber aboard a barge when killed. The court held that his work was non-maritime in character and might just as well have been done ashore. The same reasoning applies to *Teahan* v. *Industrial Accident Commission*, 210 Cal. 342 [292 P. 120] (relied on by petitioner) and distinguishes it from the instant case. There Teahan, a wharfinger, was injured while momentarily on shipboard getting the ship's manifest. He was purely a volunteer, as his duties did not require him to leave the wharf. Neither case is in point. Baskin was clearly engaged in the performance of a maritime contract at the time of injury, which was not the case with either Havard or Teahan. (See discussion of Teahan case in *Clark* v. *Cahill Bros.*, 67 Cal. App. 2d 689 at 694, 696 [155 P. 2d 125].)

A case such as the present one is *Norton* v. *Gulf Refining Co.*, 94 F. 2d 380, certiorari denied 304 U.S. 566 [58 S. Ct. 949, 82 L. Ed. 1532], where a barge on the Ohio River was being loaded with gasoline drawn from tanks on land. The company's gauger aboard the barge called the pump house and asked that McLane, an assistant, then working ashore be sent to the barge with sample bottles so that samples might be taken of the gasoline being loaded. McLane went aboard with a rack of bottles and while conversing with the gauger for not more than about three minutes an explosion occurred on the barge, fatally injuring both men. The district court held that McLane's employment had no relation to navigation and was nonmaritime, relying on *Rosengrant* v. *Havard*, *supra*. In reversing, the Circuit Court of Appeals held that "the sampling of the gasoline in the barge was necessary before the barge could depart" and distinguished the Rosengrant case, where the lumber company's employee was checking lumber aboard a barge, pointing out that "his checking of the lumber could as well have been done on shore after the lumber left

the vessel. There was no necessity for his going on the barge."

The work which Baskin was sent to do could not have been done ashore for the planks were on the ship and the crane's boom was too short to reach them. In pressing his "on shore duties" argument petitioner goes so far as to say that the ship could have been moved closer shoreward so as to bring her within reach of the boom! And it was apparently as necessary that the work on the hold be done before the ship could sail as was the sampling of the gasoline in the Norton case. McLane had been taken from his shore duties and ordered onto the water; Baskin likewise. In both cases the work on the ship was maritime in character.

Parker v. *Motor Boat Sales, Inc., supra,* is likewise similar to this case on its facts. There one Armistead was employed in the sales company's store as a janitor and porter. On the occasion in question an outboard motor had to be tested on a trial run, and after Armistead had helped to install it the employee in charge asked him to go along as a lookout to watch for submerged obstacles in the muddy river. The boat hit one of them, capsized, and he drowned. It was held by the Circuit Court of Appeals (116 F. 2d 789), as it is urged here, that Armistead's duties were predominantly on shore, local and nonmaritime, but this holding was reversed, the Supreme Court emphasizing the point that the statute applies to persons "employed . . . in whole or *in part* upon the navigable waters of the United States."

The test found in the Teahan case helps to solve the present problems. At 210 Cal. 346 the court adopts the following from *La Casse* v. *Great Lakes Eng. Works*, 242 Mich. 454 [219 N. W. 730, 733]: ". . . (3) If an injury occurs on navigable waters and in the performance of a *maritime* contract, it is certainly within the exclusive jurisdiction of admiralty unless (a) the contract is of merely local concern; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic features of the general maritime law, or interfere with the proper harmony or uniformity of that

law in its international or interstate relations.' (4) State workmen's compensation laws . . . are applicable to *maritime* service on navigable waters, when, and only when, the service is within exceptions (a), (b) and (c) above."

The present case falls within none of these exceptions. (a) There was nothing local about the contract. (b) The repairs to the hold of the "Moultrie" fitted her for the stowage of overseas cargo. "Repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce. . . ." (*John Baizley Iron Works et al.* v. *Span*, 281 U. S. 222, 232 [50 S. Ct. 306, 74 L. Ed. 819, 822].) That being so it follows (c) that the application of state law would directly invade the federal jurisdiction.

In addition to the Teahan case petitioner relies chiefly on *Davis* v. *Department of Labor, etc., supra.* The facts of the Norton and Parker cases, *supra*, are clearcut. With such federal authorities as these and with such others before us as *Great Lakes etc. Co.* v. *Kierjewski*, 261 U. S. 479 [43 S. Ct. 418, 67 L. Ed. 756], *Gonsalves* v. *Morse etc. Co.*, 266 U. S. 171 [45 S. Ct. 39, 69 L. Ed. 228], *Robins etc. Co.* v. *Dahl*, 266 U. S. 449 [45 S. Ct. 157, 69 L. Ed. 372], and the Span case, in all of which the workmen were injured while making repairs on a commissioned ship lying in navigable waters, it is not difficult to distinguish the Davis case from the present one. The following language (317 U. S. 253) shows why that was classified as a "twilight zone" case; "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; but, *employees such as decedent here* occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." (Emphasis added.) Davis was a structural steel worker employed by a contractor engaged in dismantling an abandoned drawbridge spanning a river in the State of Washington—an obstruction to navigation. The facts are comparable with those in *Millers' Indemnity Underwriters* v. *Braud*, 270 U. S. 59 [46 S. Ct. 194, 70 L. Ed. 470], where the workman was a diver submerged in navigable waters, engaged in sawing off the

timbers of an abandoned set of launching ways—an obstruction to navigation. His air supply failed, he died of suffocation and it was held that the matter was "of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

Petitioner's case instead of being in the "twilight zone" is definitely on the same side of the line as the numerous cases (some of them cited herein) which have followed the rule which *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 [37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C 451, Ann. Cas. 1917E 900, 14 N. C. C. A. 597], laid down before the present federal compensation law was enacted, but which has been adhered to ever since in cases arising under that act.

Los Angeles etc. Co. v. *Industrial Accident Commission,* 57 Cal. App. 352 [207 P. 416], cited by petitioner, is not in point because there the workman was engaged in the construction of a ship not yet commissioned, hence not in maritime employment (1 Am. Jur. 565-566, *supra*). *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469 [42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008] was such a case and was followed in 57 Cal. App. at 355.

Numerous authorities both federal and state have been cited by both sides but it is not necessary to discuss them all in view of the authorities cited herein, the facts of which are comparable with those in the present case. It is sufficient to refer to the footnote to the Davis case, 317 U. S. 254, 87 L. Ed. 249, where scores of cases on both sides of the question are cited. That note refers also, for state cases on both sides, to the Circuit Court of Appeals' opinion in the Parker case, 116 F. 2d 789. It also refers to the excellent review of the subject, entitled "*Workmen's Compensation and the Maritime Law,*" by Professor Stanley Morrison, in 38 Yale Law Journal, 472-502.

The order of the commission is affirmed.

Nourse, P. J., and Dooling, J., concurred.

APPENDIX B

Filed in the United States Supreme Court, October 24, 1949

No. 224. *Baskin* v. *Industrial Accident Commission, et al.* On petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The petition for writ of certiorari is granted. It appears that the decision of this Court in *Bethlehem Steel Co.* v. *Moores,* 335 U.S. 874, affirming the decision of the Supreme Judicial Court of Massachusetts, 323 Mass. 162, 80 N. E. 2d 478, was not available to the District Court of Appeal at the time of its consideration of this cause. The judgment is vacated and the cause remanded to the District Court of Appeal for reconsideration in the light of *Bethlehem Steel Co.* v. *Moores, supra,* and *Davis* v. *Department of Labor,* 317 U.S. 249. See *Minnesota* v. *National Tea Co.,* 309 U.S. 551; *State Tax Comm'n* v. *Van Cott,* 306 U.S. 511.

APPENDIX C

Opinion and Order Appealed From

Filed in the District Court of Appeal April 28, 1950

This proceeding was brought to review an order of the Commission which dismissed petitioner's application for compensation on the ground that the case is exclusively within federal jurisdiction.

The cause was before this court some months ago, and on January 11, 1949 we affirmed the Commission's order (Baskin v. Industrial Accident Commission, et al., 89 Cal. App. 2d 632; 201 Pac. 2d 549). A rehearing was denied and thereafter a hearing by our Supreme Court was denied. Petitioner then sought a writ of certiorari in the Supreme Court of the United States. In granting the writ of October 24, 1949, that court vacated our judgment and remanded the cause to this court "for reconsideration in the light of Bethlehem Steel Co. v. Moore, 335 U. S. 874, and Davis v.

Department of Labor, 317 U. S. 249, it appearing that the decision of this court in Bethlehem Steel Co. v. Moore, supra, affirming the decision of the Supreme Judicial Court of Massachusetts, 323 Mass. 462, [162], was not available to the District Court of Appeal at the time of its consideration of this cause. See Minnesota v. National Tea Co., 309 U. S. 551; State Tax Commission v. Van Cott, 306 U. S. 511."

Accordingly the cause was reargued and again submitted.

Petitioner was a materialman employed from March, 1943 until December 10, 1945 by respondent Kaiser Company, Inc., at its Shipyard No. 3. His work during that time was entirely on shore (or on ships under construction) with the exception of two or three tours of short duration when he was sent to work aboard ships being repaired.

On December 10, 1945 the S. S. "William Moultrie" was undergoing repairs. She was one of three vessels tied up side by side at the shipyard wharf in San Francisco Bay and was the farthest out. A crane on the wharf moved materials from place to place on these ships. One of the holds on the "Moultrie" was being repaired. The crane's boom could not reach the planks already on board, to move them from one hold to another, and it became necessary to send men aboard to do so. Despite standing instructions that Baskin should not be sent aboard ships under repair, he was ordered onto the "Moultrie" to help, and while there fell down a hold and was seriously and permanently injured.

In 1927 Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sections 901-950). Section 902, subd. 4, shows that the act covers persons "employed in maritime employment, in whole or in part, upon the navigable waters of the United States . . ." Section 903(a) provides that "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . . and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . ."

Petitioner contends that this language indicates that "Congress made clear its purpose to permit state compensa-

tion protection whenever possible . . ." (Davis v. Department of Labor, etc., 317 U. S. 249, 252, 87 L. Ed. 246, 63 S. Ct. 225) and states the question presented for decision as follows: "Only if the state could not constitutionally provide compensation for petitioner's injuries, may the order of respondent Commission be sustained."

It is well settled that ". . . contracts for the building of vessels or ships, or for labor performed, or materials furnished, in their construction, are *not* maritime contracts and *not* cognizable in admiralty, . . ." but that "*After a vessel has been completed and put in commission, contracts . . . to repair her . . . are maritime in their nature . . .*" (1 Am. Jur. pp. 565-566; New Bedford Dry Dock Co. v. Purdy, 258 U. S. 96; 66 L. ed. 482, 42 S. Ct. 243.) (Emphasis added.)

The "Moultrie" was in commission and undergoing repairs hence the work on her was being done under a maritime contract.

In developing their contention that this case is within the state and not the federal act, counsel for petitioner argue that Baskin was not a carpenter; that he did nothing by way of attaching or affixing lumber or other materials to the structure of the vessel, but was a mere helper carrying planks from one hold to another, where a skilled joiner was to make them a part of the ship. The answer to this is that he was just as much engaged in the performance of his employer's maritime contract as was the joiner who did the carpentry, albeit of humbler station.

With respect to the difference in status, noted above, between a ship under construction and a commissioned ship under repair, petitioner points out that he was paid at two different rates, i. e., $1.20 an hour while on "new construction" and $1.34 while on repair work, and that on the day of his injury he was paid at the "new construction" rate. This is urged in aid of petitioner's broader point that his work was non-maritime, local and predominantly on shore; that his infrequent assignments to ships under repair were of but a quarter-hour to an hour's duration, hence that his work on shipboard when injured was a mere

deviation from his regular non-maritime shore job, bringing the case within the *de minimis* rule.

When this case was before us the first time we reached the conclusion that such cases as Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 144, 49 S. Ct. 88, 73 L. Ed. 232, 234; John Baizley Iron Works, et al. v. Span, 281 U. S. 222, 232, 50 S. Ct. 306, 74 L. Ed. 819, 822; Employers' Liability Assurance Corp. v. Cook, 281 U. S. 233, 236, 50 S. Ct. 308, 74 L. Ed. 823, 824, and Parker v. Motor Boat Sales, Inc., 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184, compelled an affirmance of the Commission's order.

As is pointed out in the mandate directed to this court, the case of Bethlehem Steel Co. v. Moore, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. —, affirming Moore's case, 323 Mass. 162, 80 N. E. 2d 478, was not available to us when we had the case under consideration. That case was decided on December 6, 1948 without opinion.

In Moore's Case the employee was injured while aboard a vessel in a dry dock floating in navigable water. He was a rigger whose work was variously on piers, dry docks and ships. There was conflicting testimony as to the proportion of his time spent on the piers and the proportion spent on the dry docks and vessels. The board found that the major portion of his work was on the piers but that occasionally it took him aboard vessels. The floating dry dock was fastened to the pier to which it was berthed by bolts spanning a distance of three or four feet from the pier itself.

In Moore's Case the Supreme Judicial Court of Massachusetts said (80 N. E. 2d 479-481): "We start with the established proposition that the Massachusetts Workmen's Compensation Law covers all longshore maritime injuries not excluded by the constitutional grant of admiralty and maritime jurisdiction to the United States. [citations.]

"But since the decision in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E 900, it has been necessary to observe carefully the line of demarcation between State and Federal authority as defined by a series of decisions of the Supreme Court of the United States following that case. In O'Hara's

Case, 248 Mass. 31, 142 N. E. 844, decided in 1924, it appeared that the two injured employees were, at the times of their respective injuries, working on dry docks, one of which was floating and moored to piers and the other of which rested upon and was attached to land, and that each employee was engaged in the general work of repairing a previously completed vessel. The circumstances cannot, in our opinion, be distinguished in any material respect from those presented in the case at bar. This court reviewed at length the Federal decisions up to that time and stated as its conclusion the following, 'The principle deducible, as we think, from all these decisions, is that the rights and liabilities of parties with respect to injuries received by a workman engaged in repair of a completed vessel lying in navigable waters are governed by maritime law, because the work had direct relation to navigation and the injury occurs on navigable waters.' 248 Mass. at page 37, 142 N. E. at page 847. It was held that the State act did not apply. This court further held that a dry dock designed to receive vessels floating in navigable waters is itself part of the navigable waters and subject to admiralty jurisdiction, citing The Steamship Jefferson, 215 U. S. 130, 142, 143, 30 S. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907; and The Robert W. Parsons, 191 U. S. 17, 33, 34, 24 S. Ct. 8, 48 L. Ed. 73. See to the same effect Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171, 45 S. Ct. 39, 69 L. Ed. 228. A decision generally similar to that in O'Hara's case, had also been made by this court in Ahern's Case, 247 Mass. 512, 142 N. E. 703. A repair job on a previously completed vessel has been held to fall within Federal jurisdiction, even though the repairs require the laying up of the vessel for a long period, and even though they entirely change the character of the vessel and the uses for which it is adapted. New Bedford Dry Dock Co. v. Purdy, 258 U. S. 96, 42 S. Ct. 243, 66 L. Ed. 482; Hillcone Steamship Co. v. Steffen, 9 Cir., 136 F. 2d 965, 967. A different rule prevails where the work is being done in the construction of a new vessel, even though in part performed on navigable water, since a contract for new construction is not maritime in character and has no direct relation

to navigation or commerce. Such work remains within State jurisdiction. Thames Towboat Co. v. The Francis McDonald, 254 U. S. 242, 41 S. Ct. 65, 65 L. Ed. 245; Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008; Millers' Indemnity Underwriters v. Braud, 270 U. S. 59, 63-64, 46 S. Ct. 194, 70 L. Ed. 470.

"Decisions of the Supreme Court of the United States since O'Hara's Case was decided by this court were in accord with the rule there laid down until very recently. Robins Dry Dock & Repair Co. *v.* Dahl, 266 U. S. 449, 457, 45 S. Ct. 157, 69 L. Ed. 372; John Baizley Iron Works *v.* Span, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819. If the matter rested at this point we should conclude that the decisions above cited furnished the necessary guide and required us to dismiss the claim under the State compensation law, as was done in O'Hara's case.

"But the situation was definitely altered by the decision of the Supreme Court of the United States in Davis *v.* Department of Labor and Industries of Washington, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246, written by Mr. Justice Black in 1942. That was not a case of repairs upon a previously completed vessel. It was a case where the employee fell from a barge where he was examining steel that he had just helped to cut from a bridge which was in process of being dismantled. The significance of the case, however, lies in its obvious attempt to set up a means of escape from the difficulties involved in drawing the line between State and Federal Authority under the doctrine of the Jensen case. The Davis case recognizes a presumptive quality in the decisions of Federal Authorities under the longshoremen's and harbor workers' act and a presumption of constitutionality of the State acts as applied to particular cases. The decision does not overrule the Jensen case. It does, however, at least as appraised by Mr. Justice Frankfurter, who concurred in it, and by Chief Justice Stone, who dissented from it, create a 'twilight zone' or an area of doubt within which the two acts overlap and the injured workman may recover under either of them. It would seem, therefore, that although apparently some heed must

still be paid to the line between State and Federal authority as laid down in the cases following the Jensen case, the most important question has now become the fixing of the boundaries of the new 'twilight zone', and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. Mr. Justice Frankfurter says that 'Theoretic illogic is inevitable as long as the employee . . . is permitted to recover' at his choice under either act. 317 U. S. at page 259, 63 S. Ct. at page 230. Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future."

In our first opinion we gave careful consideration to Davis *v.* Department of Labor, etc., supra, for it was on that case that the petitioner chiefly relied. We thought, however, that it was "not difficult to distinguish the Davis case from the present one" and gave the reasons (at 89 Cal. App. 2d 637, 201 P. 2d 552-3), based on decisions of the Supreme Court of the United States, why we thought our case was not within the "twilight zone". The affirmance in Bethlehem Steel Co. *v.* Moore, 335 U. S. 874, supra, of Moore's case, 323 Mass. 162, supra, plainly indicates, although no opinion was filed, that the Supreme Court considers the present case within the "twilight zone".

The Massachusetts court in Moore's Case took a different view of the Davis case than we took, giving it more latitude than we thought it had, but the affirmance, in 335 U. S.

874, based on the authority of the Davis case, shows theirs was the correct view.

It cannot be gainsaid that the facts in Moore's Case and in Baskin's are very similar. In both instances the major part of the employee's work was on shore, and in both instances he was injured while working on a vessel in commission, in navigable waters, and being repaired under a maritime contract.

Our clear duty is to reverse our former holding in this case, on the authority of *Bethlehem Steel Co.* v. *Moore, supra,* and *Davis* v. *Department of Labor, etc., supra.*

Accordingly the order of the respondent Commission is annulled with the direction to proceed with a hearing and determination of petitioner's application.

GOODELL, J.

We concur: NOURSE, P. J., DOOLING, J.

APPENDIX D

DEERING'S CALIFORNIA LABOR CODE

"Section 3300. *'Employer' defined.* As used in this division, 'employer' means:

(a) The State and every State agency.

(b) Each county, city, district, and all public and quasi public corporations and public agencies therein.

(c) Every person including any public service corporation, which has any natural person in service.

(d) The legal representative of any deceased employer. [Enacted 1937.]"

* * * * * * *

"Section 3351. *'Employee': Defined.* 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express

or implied, oral or written, whether lawfully or unlawfully employed, and includes:

(a) Aliens and minors.

(b) All elected and appointed paid public officers.

(c) All officers and members of boards of directors of quasi-public or private corporations while rendering actual service for such corporations for pay. [Enacted 1937.]

"Section 3352. *Same: Persons excluded.* 'Employee' excludes:

(a) [*Casual employees.*] Any person whose employment is both casual and not in the course of the trade, business, possession, or occupation of his employer.

(b) [*Farm employees.*] Any person employed in farm, dairy, agricultural, viticultural or horticultural labor, or in stock or poultry raising where the compensation provisions of this division are rejected, or do not apply, in accordance with Chapter 9 of this part.

(c) [*Newspaper and magazine vendors.*] Any person engaged in vending, selling, offering for sale, or delivering directly to the public, any newspaper, magazine or periodical where the title thereto has passed to the person so engaged.

(d) [*Service for aid or sustenance.*] Any person performing services in return for aid or sustenance only, received from any religious, charitable or relief organization.

(e) [*Deputy for own convenience and without compensation.*] Any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for his own convenience and who receives no compensation from the county or municipal corporation or from the citizens thereof for his services as such deputy. This exclusion is operative only as to employment by the county or municipal corporation and does not deprive any person so deputized from recourse against a private person em-

ploying him for injury occurring in the course of and arising out of such employment.

(f) [*Convicts.*] Any convict whose labor is used by the State Highway Commission on State highways or roads.

(g) [*Domestic servants.*] Any person engaged in household domestic service except as provided in section 3358.5. [Enocated 1937; Amended by Stats. 1939, ch. 1043, § 1, p. 2873.]"

• • • • • • •

"Section 3600. *Conditions essential.* Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

(c) Where the injury is proximately caused by the employment, either with or without negligence.

(d) Where the injury is not caused by the intoxication of the injured employee.

(e) Where the injury is not intentionally self-inflicted. [Enacted 1937.]"

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NOV 6

No. 402

KAISER COMPANY, INC. and HARTFORD ACCIDENT & INDEMNITY COMPANY,

vs. *Appellants,*

REUBEN FRANKLIN BASKIN, BY HIS GUARDIAN AD LITEM AND TRUSTEE, CATHERINE DUNN, AND INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA,

Appellees

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION TWO, OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

FRANKLIN C. STARK,
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by His Guardian Ad Litem and
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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No. 402

KAISER COMPANY, INC. and HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellants,

vs.

REUBEN FRANKLIN BASKIN, BY HIS GUARDIAN AD LITEM AND TRUSTEE, CATHERINE DUNN, AND INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellee Reuben Franklin Baskin, by his Guardian ad Litem and Trustee, Catherine Dunn, moves the Court to dismiss this appeal or to affirm the judgment below for the reasons, respectively, that there is no substantial federal question presented as a basis of jurisdiction in this Court, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

WHEREFORE said Appellee moves the Court to dismiss the appeal in this cause or, in the alternative, to affirm the judgment of the District Court of Appeal of the State of California in and for the First Appellate District, Division Two, from which this appeal is taken.

I. Comments on Appellants' Statement of the Facts

Appellants' statement of the facts tends incorrectly to present certain facts, and also injects as material, certain facts which are either immaterial here, or if material should have been called to the attention of the District Court of Appeal below upon petition for rehearing.

Thus, appellants state that Baskin was hired "sometime prior" to the accident and that "for the most part," his duties consisted of carrying materials from warehouses to vessels under construction. This scarcely makes clear that the employee here involved worked for appellant employer for nearly three years before the occurrence of the injury, which has permanently and totally disabled him, and that during that extended period of time his work was entirely on shore (or on ships under construction) with the exception of two or three tours of short duration (a half hour to an hour each at most) when he was sent to work aboard ships being repaired.

Further, appellants' reference to the employee as a "joiner-materialman" is incorrect. He performed no joiner functions. He was a materialman only.

Appellants inject into their statement, the fact that they reported the injury to the Federal Deputy Commissioner, filed medical reports with him, reported payments of compensation to him, and held a conference at his office to discuss with Baskin's sister, a possible lump sum commutation.

We believe these particular facts to be immaterial, in view of the fact that Baskin at no time filed any claim under

the Federal Longshoremen and Harbor Workers' Act [44 Stats. 1424, 33 U. S. C. §§ 901-950] (hereinafter referred to as the Federal Act''), and that there was never any hearing, fact-finding or award of any kind made under that Act.

Baskin's claim for compensation under the California Workmen's Compensation Act [Labor Code, §§ 3201-6149 (Deering's 1943)] (hereinafter referred to as the ''State Act''), was made in the belief that although his injuries were sustained in the furtherance of repair work on a vessel in navigable waters, nevertheless since he was engaged in an ordinary land occupation and aboard the ship only casually, he was not deprived of the helpful provisions of the State Act, which contains no limit on recovery in cases of permanent total disability.

Following the injury, the employer's insurance carrier (appellant Hartford Accident & Indemnity Company) paid compensation to Baskin under the Federal Act which by its terms limits total recovery to $7500,[1] even though there may be permanent total disability or death [33 U. S. C., § 914(m)]. Appellant carrier had the employer's coverage under both the State Act and the Federal Act, and its decision on December 17, 1945 (7 days after the accident) to pay compensation under the Federal Act was not joined in by Baskin who was then unconscious and not expected to live. Baskin has accepted the compensation payments made to him, but has consistently asserted throughout his right to compensation under the State Act, and to treat payments made as on account of State benefits.

Any activity of Baskin's sister in conferring with a representative of the carrier in the Federal Deputy Commis-

[1] The Federal Act has now been amended to provide that the limitation shall not apply to cases of permanent total disability or death. The amendment is applicable only to injuries occurring after its effective date, namely, June 24, 1948 (see note under 33 U.S.C.A. § 906).

sioner's office, at a time prior to her appointment by the Industrial Accident Commission of the State of California as his guardian *ad litem* and trustee, would of course not be binding on him. The injury has rendered him mentally, as well as physically, disabled. It is uncontroverted that he was never represented by counsel before the Federal Deputy Commissioner.

Even if these particular facts now injected by appellants were material (and they are not), still, they are not referred to in the opinion from which the appeal is taken, were not called to the attention of the District Court of Appeal on petition for rehearing, and should not accordingly be regarded now.[2]

The material facts are correctly summarized by the District Court of Appeal as follows:

> "Petitioner was a materialman employed from March, 1943 until December 10, 1945 by respondent Kaiser Company, Inc., at its Shipyard No. 3. His work during that time was entirely on shore (or on ships under construction) with the exception of two or three tours of short duration when he sent to work aboard ships being repaired.
>
> "On December 10, 1945 the S.S. 'William Moultrie' was undergoing repairs. She was one of three vessels tied up side by side at the shipyard wharf in San Francisco Bay and was the farthest out. A crane on the wharf moved materials from place to place on these ships. One of the holds on the 'Moultrie' was being

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[2] Rule 29(b) of the Rules on Appeal, adopted by the Judicial Council of the State of California on March 30, 1943, provides in part:

"(b) [Examination of record] On petition for hearing the Supreme Court will not examine the record for error, or inquire into the correctness of the facts stated in the opinion unless the petition shows: (1) that material facts were omitted from or incorrectly stated in the opinion of the District Court of Appeal and that the alleged omission or other inaccuracy was set forth in a petition for rehearing and not corrected by the District Court of Appeal . . ." (Civil Procedure and Probate Codes of California (1949) Deering Appendix).

repaired. The crane's boom could not reach the planks already on board, to move them from one hold to another, and it became necessary to send men aboard to do so. Despite standing instructions that Baskin should not be sent aboard ships under repair, he was ordered onto the 'Moultrie' to help, and while there fell down a hold and was seriously and permanently injured."

II. The Questions Involved Are Not Substantial

This is the second time that this case has come before this Court. On the first occasion, Baskin as petitioner sought certiorari on the ground that the District Court of Appeal had decided a federal question of substance in a way not in accord with two applicable decisions of this Court, one of which had not been available to the District Court of Appeal at the time of its consideration of the cause [No. 224, *Baskin* v. *Industrial Accident Commission of the State of California, et al.*, October Term, 1949]. The District Court of Appeal, at that stage of the litigation, had entered its judgment affirming that the Industrial Accident Commission of the State of California had no jurisdiction over Baskin's claim.

This Court in a *per curiam* decision (338 U. S. 854, 94 L. Ed. Adv. Op. 62) granted the petition for writ of certiorari, vacated the judgment of the District Court of Appeal, and remanded the cause to the District Court of Appeal for reconsideration in the light of the two decisions, namely, *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, affirming the decision of the Supreme Judicial Court of Massachusetts, 323 Mass. 162, 80 N. E. (2d) 478, and *Davis* v. *Department of Labor*, 317 U. S. 249.

Upon remand, the District Court of Appeal reset the cause for further argument, heard such argument, received additional briefs, and after submission of the matter, rendered its present opinion holding in favor of state jurisdiction in the premises.

In the *Davis* case, it had been determined by this Court that there is a presumption of constitutionality attendant upon a state workmen's compensation act which requires a state to take jurisdiction of claims filed in its tribunals when such are in the "twilight zone" between such state acts and the Federal Act.

In the *Bethlehem Steel* case, it had been determined by this Court that a workman ordinarily employed on land but occasionally going on a vessel to aid in repair work is within the "twilight zone", and thus entitled to the presumption of constitutionality.

The District Court of Appeal points out in its opinion below that the facts in the *Bethlehem Steel* case and the case at bar "are very similar." Accordingly, upon reconsideration, it directed the Industrial Accident Commission to proceed with a hearing and determination of Baskin's application. Its duty so to do, in view of the decisions cited, was so clear that the present appeal can only be considered as raising no substantial federal question or as requiring no further argument to an affirmance.

A. *The Facts of the Bethlehem Steel Case Cannot Be Distinguished from the Case at Bar*

Appellants endeavor to distinguish the *Bethlehem Steel* case on the asserted point that the repair work on the ship there involved amounted to a conversion of the ship.

It is a complete answer to this that the decision of the Supreme Judicial Court of Massachusetts, affirmed by this Court, does not rest on any such distinction, nor would the facts of the case support such. The injured workman involved was a rigger who spent the major portion of his time on the piers but occasionally went aboard vessels. At the time of injury, he was aboard a vessel on navigable waters, engaged in furthering its repair. The vessel was a

475 foot tanker which had suffered damage by an explosion to about forty or fifty feet of her stern. There was no indication of any kind that any conversion work was being done. The repair was of the damage to approximately 1/10 of the ship, and that alone. Chief Justice Qua, for the Massachusetts Court carefully pointed out that, prior to the *Davis* case, he would have reached an opposite result under the decision in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086. He concluded, however, that:

> ". . . the situation was definitely altered by the decision of the Supreme Court of the United States in Davis v. Department of Labor . . ." (80 N. E. (2d) at 480).

and that there was now included:

> ". . . within the twilight zone the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs" (80 N. E. (2d) at 481).

The "Statement As to Jurisdiction", filed with this Court by Appellant Bethlehem Steel Company in the *Bethlehem Steel* case makes abundantly clear that the facts involved relate to normal ship repair. "It is believed that this case presents not merely one special set of facts, but presents a *characteristic*[3] set of facts upon the basis of which the decision will govern all ship repair work." (No. 369, October Term, 1948, Vol. 3949, United States Supreme Court Records, p. 8 of "Statement As to Jurisdiction").

It is merely appellants' own fiat that the question of degree in the *Bethlehem Steel* case was "whether the work

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[3] Italics are from the quotation itself.

on the vessel amounted to mere repairs or to a reconstruction of the ship." No strength may be drawn for this assertion from Chief Justice Qua's reference to and citation of the Texas case of *Emmons* v. *Pacific Indemnity Co.*, 208 S. W. (2d) 884, or the New Jersey case of *DeGraw* v. *Todd Shipyards Co.*, 134 N. J. L. 315, 47 A. (2d) 338. The *Emmons* case does not even discuss any alleged difference between repair and conversion, but, upon the strength of the *Davis* case, determines that:

> "The facts of this case show that petitioner was doing certain work that could not be classified, as a matter of law, as of such a maritime nature as to bring his case exclusively under the jurisdiction of a court of admiralty" (208 S. W. (2d) at 888).

The *DeGraw* case involved a ship being completely converted from a freighter to an A. P. Attack-transport, a change of "the character of the vessel" (47 A. (2d) at 339). Such was not present in the *Bethlehem Steel* case.

It is readily apparent that the similarity to which the Massachusetts Court refers is the existence in all of the cases of a "twilight zone" situation as contemplated by the *Davis* case, which permitted the employee to choose the state forum and to stay there, as against the contention that he should have chosen some other forum.

B. *The Decision Below Is Not in Conflict with Parker Motor Boat Sales, Inc.*

Appellants argue that if the work here involved was merely ship repair work, the decision below can be supported only by doing away with the rule of *Parker* v. *Motor Boat Sales, Inc.* (1941) 314 U. S. 244, 86 L. Ed. 184.

The argument fails, however, to take into account that the *Parker* case does not involve the presumption of con-

stitutionality of a state statute, but is rather a case in which an exercise of federal jurisdiction was sustained by this Court. The *Parker* case, as explained in the *Davis* case, rests on the statutory presumption of federal jurisdiction, certain particular facts in that case being sufficient to sustain the action of the federal administrative agency. That being so, the *Parker* case may not be taken as controlling a factual situation presented not to such a federal agency but to a state tribunal. To regard it as determining the reach of a state workmen's compensation act would be to deny full weight to the presumption of the constitutionality of such an act, to fail to resolve all doubts in its favor, and instead, to thrust the burden of a presumption of federal jurisdiction upon every petitioner claiming under such an act.

That the *Parker* case may not be so viewed, is explained by this Court in the *Davis* case, where it was said of *Parker:*

> "• • • we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities • • • Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination and award, our task proves easy. There we are aided by the provisions of the federal act, 33 U. S. C. A. 920, which provides that in proceedings under that act, jurisdiction is to be presumed in the absence of substantial evidence to the contrary. Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. *It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra.*"[4]

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[4] Italics supplied.

C. *There Has Always Been Doubt Whether Baskin's Work at the time of Injury Was Maritime or Non-maritime*

Appellants assert that "In Baskin's case there has been no question but that Baskin was doing maritime work in repairing the ship at the time of his injury" (Statement as to Jurisdiction, p. 19).

This is not correct. At every juncture before the State Commission and in the State Courts, the question has been argued whether Baskin's work at the time of injury was maritime or non-maritime, and a host of decisions pro and con on that score have been carefully analyzed and discussed in the numerous briefs filed before the various state tribunals. The District Court of Appeal in its opinion adverts to "petitioner's broader point that his work was non-maritime, local and predominantly on shore . . ."

Baskin's petition for a writ of certiorari to this Court was based, however, not on any failure of the state tribunal to recognize the non-maritime character of his work, but on the ground that the State Act purported to apply to his injury and was constitutional in such application. The *Bethlehem Steel* case, having made abundantly clear the application of the rule of the *Davis* case to occasional acts of repair by a land workman, Baskin's right to his choice of the state forum did not depend upon any resolution of the "maritime-non-maritime" dispute. Its genuine existence, however, cannot be properly denied by appellants.

D. *The Twilight Zone Concept Diminishes, Rather Than Increases, the Difficulties Confronting the Land Workman Injured on a Vessel on Navigable Waters.*

Appellants contend that insurance administration is hampered by the rule of the *Davis* and *Bethlehem Steel* decisions, and of the decision below, in that litigation will result in order to force binding elections upon employees.

From a practical standpoint, most every employer can and does "secure a Longshoremen's Endorsement from the same carrier which writes his state compensation insurance, at only a nominal increase in premium" (2 Stanford Law Rev. 536, at 541). Few carriers, if any, are likely to assume the financial burden of litigating all waterfront claims, simply to assure an election at the outset in every case. The rule of the *Davis* case has been in successful operation for nearly ten years, and, far from defeating the legislative purpose to secure simple, speedy and adequate relief to injured workmen in their hour of need, it has fulfilled its purpose "to set up a means of escape from the difficulties involved in drawing the line between State and Federal Authority under the doctrine of the Jensen case" (80 N. E. (2d), at 480). As said of the action of the Supreme Court of the United States in the instant case, in remanding for reconsideration (4 N. A. C. C. A. Law Journal, p. 174):

> "The decision of the United States Supreme Court is both sound and practical. A workman is confronted with the problem of whether he belongs under the state act or the federal act—both being *compensation acts*. The employer or insurer in defending usually raises the question of 'wrong jurisdiction' whichever way the employee makes his choice. *A fortiori*, if the injured worker chooses the jurisdiction giving the higher award, this defense will almost inevitably be raised. Hence thousands upon thousands of cases happening in the twilight zone of amphibious employment are potential cases for the United States Supreme Court. Harbor workers cases alone could easily swamp our highest tribunal. Self defense as well as common sense therefore dictates that whichever of the two tribunals (state or federal) is asked to take jurisdiction should do so, in this twilight zone, and end all jurisdictional disputes. Davis v. Department of Labor, 317 U. S. 249, Bethlehem Steel Co. v. Moore, supra, reviewed in 2 NACCA Law Journal 52-61."

If this line of argument has made its greatest impression, as appellants contend, upon lawyers whose special competence lies rather in the field of constitutional law than in insurance administration, the answer is that the question upon which they now seek review is a question of constitutional law. Their claim of injury to insurance administration by the rule of the *Davis* case is basically one to be addressed to legislative rather than judicial tribunals. Such does not create a substantial question of federal constitutional law where otherwise there is none.

Conclusion

No question of law remains unsettled in the case at bar. The case has already been before this Court and is presently controlled by its mandate. If the *Davis* and *Bethlehem Steel* cases are not controlling, and if the District Court of Appeal was not entitled to follow them, as appellants argue, then no gainful purpose was to be served by this Court's former remand herein to the District Court of Appeal for reconsideration in the light of those decisions.

The present decision of the District Court of Appeal recognizes that Baskin is within the "twilight zone". Such a decision is wholly in accord with the purpose of the *Davis* case to free an injured employee like Baskin from doubt as to which Act covers his disability, and to permit him to choose and be right in his choice.

Baskin's injury occurred on December 10, 1945. He is a young man, now totally and permanently disabled for life. He is still struggling, almost five years later, to get an award of compensation under the State Act under which he admittedly worked day in and day out for almost three years, and under which his employer was admittedly insured. This Act admittedly purports to cover him, and, consistently with applicable authoritative decisions of this Court, this Act as so applied has now been held constitutional as against

the asserted bar of Article 3, Section 2 of the Federal Constitution.

We respectfully submit that the appeal should be dismissed for want of a substantial federal question, or should be affirmed upon the basis of the *Davis* and *Bethlehem Steel* decisions.

Dated in Oakland, California, October 11, 1950.

Respectfully submitted,

FRANKLIN C. STARK,
Attorney for Reuben Franklin Baskin, by his Guardian ad Litem and Trustee Catherine Dunn.

STARK & CHAMPLIN,
SAMUEL B. HOROVITZ,
National Association of Claimants' Compensation Attorneys,
Of Counsel.

APPLICANT'S EXHIBIT No. 1

HOWARD C. NAFFZIGER, M. D.
O. W. JONES, JR., M. D.
HOWARD A. BROWN, M. D.
384 Post Street
San Francisco, U. S. A. (8)

February 18th, 1946.

Dr. Jacob Smith, 490 Post St., San Francisco, California.

Re: Mr. Reuben F. Baskin

DEAR DR. SMITH:

The above patient was interviewed and examined on February 18th, 1946.

On December 10th, 1945, he fell a distance of 35 feet; he does not know the details regarding the accident, but he thinks that he landed on his right side and struck the right side of his head on a saw-horse. He was unconscious for a period of three weeks, he had bleeding from the nose and mouth and from the left ear. He was under the care of Dr. Cutting and Dr. Baritell in the Permanente Hospital, for about six weeks. He apparently sustained a fracture of the right forearm just above the wrist.

At the present time, he has the following complaints:—

(1) generalized headaches, which come and go.

(2) thickening of his voice.

(3) weakness and pain in the right lower extremity. No sensory disturbance in this extremity.

(4) Occasional tinnitus, especially on the right side.

(5) low back pain, which comes and goes.

(6) a tremor of the left upper extremity, which comes when he is at rest, and when he moves or uses the extremity, the tremor disappears.

(7) dizziness.

(8) some impairment of memory.

Because of a ptosis of the right side vision is interfered with.

The patient was informed that he had sustained a basal fracture and apparently a fracture in the right frontal region.

The right upper extremity has been out of the cast for about a week.

PAST HISTORY: a fracture of the right forearm in 1927. Operations—appendectomy in 1945.

Systems: negative.

Weight: average 150 lbs., at present 116 lbs., and the weight-loss has taken place since his accident.

EXAMINATION shows a 25-year old male who *takes* with a southern accent but with a decided nasal twang to his voice.

Head—there is a scar on the right frontal region which is well-healed and non-tender.

I. *Cranial Nerves:* Normal.

II. There is reduced visual acuity in the right eye, and the right optic disc is on the pale side. The gross visual fields were normal.

III, IV & VI. In the right eye he has a complete third nerve paralysis. The only nerve working, as far as I could tell, is the sixth—i.e. he has outward gaze. The right eye is deviated laterally because of this.

V. Normal.

VII. Normal, including taste.

VII. Normal.

IX. There is a question of the palate pulling to the right. Gag and palate reflexes, however, are quite acute and equal.

X, XI & XII. Normal.

The patient walks in very uncertain fashion—he is unsteady on the turn and has difficulty in maintaining his balance. He seems to have definite body ataxia. He is unable to balance on either leg. The Romberg test, with the eyes open, is quite satisfactory; with the eyes closed, it is positive.

The finger-to-nose test shows slight uncertainty on the left side. The heel-to-knee test is normal.

He has a very definite rhythmical tremor of the left upper extremity, and at times I thought there was some in the left lower extremity.

Ear-drums clear.

Mouth—he has gingivitis.

Heart and Lungs—clear.

Blood-pressure—110/70.

Sensation and motor power—normal throughout the entire body.

Vibratory sense—normal. Sense of position normal in the feet.

He has a winged scapula on the left side. The serratus magnus muscle is not acting. There is atrophy of the supra- and infra-spinatae on the left side—they seem to be acting, but because of the paralysis of the serratus magnus, one cannot fully determine the strength of the other two muscles. On the right side, the supra- and infra-spinatae are thin, but act normally.

All deep reflexes are extremely hyperactive. He has non-sustained ankle clonus bilaterally. Abdominal reflexes are equal and sluggish. The Cremasterics are equal and sluggish. He has atypical plantar responses, most noticeable on the left side.

He has a poor posture, which certainly has been present for years.

Discussion: this man, as a result of his fall, has received injury to the right third nerve, and he has clinical evidence of disturbance in the function of his cerebellum. He has nystagmus to the left only in the left eye. The right pupil is dilated and fixed. He has a very ataxic gait, which goes with cerebellar difficulty.

He has a rhythmical tremor of the left upper extremity, suggesting basal ganglion involvement.

This individual, lacking the benefit of education, is unable to read, although he can write his name. He has been able to do ordinary manual labor.

It will require a period of at least 8-12 months before a final conclusion can be drawn as to the disability which he

will have. It is certain that he will have considerable disability as a result of his accident.

He does not require any special therapy at this time.

Sincerely yours,

(S.) O. W. Jones, Jr., M. D.
Drs. Naffziger-Jones-Brown-Boldery.

P. S. I did not think X-Rays of the skull essential to the diagnosis, therefore did not have them made.

Maier I. Tuchler, M.D.
384 Post Street
San Francisco 8
Telephone Sutter 2010

March 5, 1946.

RE *Ruben Beskin*

Employer, Richmond Shipyard, #3

Date injury, Dec. 10, 1945

Mr. A. Deasy,
Hearst Building
City

Dear Mr. Deasy,

Mr. Beskin is a 25 year old native of Mississippi, of 3rd grade schooling, accompanied to the examination by one sister and an older brother who appear seriously concerned over his condition, and from the relatives the history was obtained as follows:

Past History: The patient has had some thyroid trouble *thruought* childhood, was retarded at school, but otherwise in good health. There was no previous history of accidental injury or compensation payment.

Present Illness: While employed as a joiner, and after two years of such employment, the patient fell about 10 feet from a deck to a tank top. He was given adequate immediate treatment, hospitalized for 8 weeks at the Foundation hospital, and a history of fractured skull, and of eye difficulities was related. The patient sustained a lacera-

tion to the right frontal area, a fractured right arm, the right eye was said to have been protruding from the orbit, and the skull was stated to have been fractured. Stupor and coma were related for several days following the injury.

Of recent days, the patient, who has been totally disabled and a complete ward of the sister's family, according to her statement, has become depressed and his speech has become somewhat unclear; there is also a problem over compensation, as well as guardianship, the facts of which are unclear to the examiner, who is desirous of reporting the psychiatric and neurological status on this date of examination.

Complaints: The patient complains of eye trouble ("can not see, right eye"), and he appears very dull, retarded, bewildered; speech is slurred and quite unclear; he also related headaches, and general complaints with reference to "never being the same."

Neurological Examination: On inspection the right eye appears protruding, with a squint, external. A scar over the right frontal area is noted.

Cranial Nerves: Olfactory, not tested due to uncooperative status.

2: Left pupil reacts within normal limits. Right eye ball is protruding to a marked degree, the pupil is dilated and fixed, extrocular movements are notable in that an *extrnal* squint is present. The fundi could not be visualized sue to lack of cooperation. 3,4,6: as noted above, there is an ext, squint of the left eye, with a marked difficulty regarding any cooperative study of the eyes. 5: no marked abnormalities noted. VII: no abnormalities. VIII, responses to tuning fork were so variable as to be non contributory; the patient presents a problem of concentration as to negate the majority of subjective tests. IX, X, XII. The right palate is fixed, left soft palate presents good mobility. Speech is severely disturbed, with a gutteral and slurring component, resembling "potatoe speech".

Motor system: The motor power of the right upper extremity appears less than that of the left; the entire upper extremity is held in a moderately stiff position, and the lower extremities reveal a similar spasticity on the right

with fairly average motor power on the left. Of particular importance is the fact that the right lower extremity is so spactic that the patient is unable to perform the usual tests of hell to knee coordination due to spasticity.

Sensory systems: The sensory systems were not markedly involved, since all of the usual tests for cotton, touch, pin prick, were within normal limits. Position sense, however, was poorly demonstrated.

Cerebellar and coordination, gait: The patient walks with a rollong gait, of severely unstable type, demanding the support of an assistant. When erect, and unsupported, he falls characteristically and steadily to the right. The Romberg is markedly positive. Heel to knee demonstrates a total in*oco*rdination of the synergistic faculties needed to perform the heel to knee test.

Reflexes: This patient presents a bilateral Babinski sign, the Hoffman is present on the right, and the abdominals are absent bilaterally.

Clonus is sustained at the right knee and also ankle. This extremity was markedly spastic.

The knee jerk was 4 plus on the right, 3 plus left; ankle kicks, ditto. The biceps sign and triceps reflexes were likewise 4 plus right, 3 plus left.

Discussion: This patient presents, on the basis of the neurological signs demonstrable on this date, evidence of severe trauma to the cerebellar and to the pyramidal systems. The right lower extremity, and to a lesser degree the right upper extremity, reveal abnormal reflexes, spasticity, clonus, severe corrdinate difficulties. In addition, the cranial nerve study points to a probable basilar fracture (although Xray's were not taken on this date inasmuch as it was evident that the patient has had good medical study and care, and funds were not *available*). From a more *Psychiatric point of view*, the patient presents a slurring of speech and a dulling of interests quite compatible with a post traumatic, organic, confusional state. There is no evidence of psychosis of intrinsic type, and it is evident that the patient will probably require nursing care and hospital routine in the event that the relatives are not able to so attend the patient.

Diagnosis: Residuals, Cerebral trauma, involving Cerebellar and Psyramidal systems, severe, with spasticity and incoordination, rt. upper and lower extremities;

Personality change, post traumatic, probably of a traumatic encephalopathic type, moderate.

Recommendation: This case needs nursing care and presents a grave problem of re-education of function of the right hand, probably physiotherapy, in addition to routine care. I do not believe this case presents a psychosis.

Yours truly,

(S.) MAIER I. TUCHLER, M.D.

MT/rc.

Howard C. Naffziger, M.D., O. W. Jones, Jr., M.D.
Howard A. Brown, M.D., Edwin B. Boldrey, M.D.

384 Post Street, San Francicco 8, U.S.A.

October 18th, 1946.

Dr. Jacob Smith,
490 Post St.,
San Francisco, California

RE: *Mr. Reuben F. Baskin*

Dear Dr. SMITH:

This patient was interviewed and re-examined to-day. He states that possibly there is some slight improvement in his condition, in that his headaches are less frequent than before, as is the dizziness. Aside from this, there is apparently no particular change.

Examination to-day is the same as previously reported. There is no question but that he has a primary optic atrophy on the right side. He can count fingers but can do no more with that eye. Vision in the left eye seems to be quite good. He still has marked ataxia, and the other points that I mentioned in my initial report.

Discussion: I would conclude that this patient is a total permanent disability. I know of no therapy that would be of any value to him at this time. He and his sister asked

as to the advisability of a plastic operation on the right eyelid so that he could open it; this, of course, would mean that the right eye would have to have a muscle shortening on one side. Such an operation would, of course, be only to improve the patient's looks.

Sincerely yours,

(S.) O. W. Jones, Jr., M.D.
Drs. Naffziger-Jones-
Brown-Boldrey.

OWJ/FM

APPLICANT'S EXHIBIT No. 2

KAISER COMPANY, INC., SHIPYARD NUMBER THREE
RICHMOND, CALIFORNIA

Check No.	Gross Earnings	DEDUCTIONS							Amount Paid	Period Ending
		Withholding Tax	F.O.A.B.	S.U.I.	War Bonds	Hospital	Advance	Other		
2046	9.60				3.75				5.85	12-16-45

NAME
R. F. BASKIN

Redeposited
Check Number 51—19975—Folio 56

Detach and retain this stub for your personal records

Office-Supreme Court, U.S.
FILED
NOV 6 1950
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 402

KAISER COMPANY, INC. AND HARTFORD ACCIDENT & INDEMNITY COMPANY

vs. *Appellants,*

REUBEN FRANKLIN BASKIN, BY HIS GUARDIAN AD LITEM AND TRUSTEE, CATHERINE DUNN, AND INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, *Appellees*

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

APPELLANTS' REPLY TO APPELLEE BASKIN'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

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APPELLANTS' REPLY TO APPELLEE BASKIN'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Pursuant to paragraph 3 of Rule 12 of this Court and to paragraph 3 of Rule 7, the appellants, Kaiser Company, Inc., and Hartford Accident & Indemnity Company, submit herewith their brief opposing the motion of the appellees to dismiss or affirm.

The headings in this brief are based upon the headings in appellee's motion to dismiss or affirm.

I. Comments on the Facts

The appellee takes exception to inclusion in our Statement of the Case of certain background matters. The traditional refusal of this Court to decide points of law *in vacuo* evidences its appreciation of the way facts not only raise legal questions, but illustrate and highlight the consequences of opposing legal theories.

For instance, this case was handled under the Federal Longshoremen's and Harbor Workers' Compensation Act in every sense in which it could be handled under the Act, so long as the employer and the insurance carrier complied with their statutory obligations. But we are told that none of these things constituted an election on the part of the employee, if the case was within the twilight zone; the appellee argues that none of the facts relating to what was done are even material, because "there was never any hearing, fact-finding or award of any kind made under that Act."

In evaluating the extent to which the twilight zone concept should be pressed, this Court is certainly entitled to consider that on the appellee's own theory there can be no election of remedies, unless the employer and insurance carrier violate their statutory duty (33 U. S. C. § 914) by failing to make payments under the applicable act, because there is no provision for an employer to initiate proceedings for "hearing, fact-finding or award".

The appellee says that the insurance carrier's decision to pay compensation under the Federal Act was made at a time when Baskin was unconscious and not expected to

live.[1] The appellee neglects to add that the first payment was required by law to be made within 14 days of the injury, 33 U. S. C. § 914, or file a notice of controversion. There was nothing precipitate about the making of the first payment.

The appellee's assertion that Baskin has consistently asserted "throughout" his "right" to compensation under the state act and to treat payments as made as on account of state benefits does not tell the true story. The date of his application to the state commission was July 1, 1947, more than eighteen months after the accident. Nothing in the record indicates that Baskin gave any earlier indication to the insurance carrier or to his employer that he was accepting payments as made on account of state benefits.

Again, the theory of the appellee is that the twilight zone extends to all workmen engaged in an ordinary land occupation although occasionally going on a dry dock or vessel to make repairs. Passing the point that ship repair work has always been regarded as a maritime employment and not as an ordinary land occupation, we press the objection illustrated by this case that words like "occasionally" and "casually" are completely lacking in the certainty of the meaning vital to a system of workmen's compensation. Defendants' Exhibits E and F show that during the period

[1] Under the Federal Act, temporary or permanent total disability entitled the injured man to 66⅔% of his average weekly wages (33 U.S.C. § 908) as compared to 65% under the State Act (California Labor Code, §§ 4653 and 4658). The death benefits under the California Act include $300 for burial, as against $200 under the Federal Act; and the death benefits under the State Act are payable wherever there are dependents, whereas under the Federal Act there must be a surviving spouse or child. Cf. California Labor Code, §§ 4700 and 4701 with 33 U.S.C. § 909. At the present time, the maximum death benefit under the California statute is $7,500; it was formerly $6,000. See Labor Code, § 4702, as amended by Stats. 1947, Chapter 1031 and Stats. 1949, Chapter 1414. The record does not show whether or not Baskin had dependents within the meaning of the California Act.

from August 18, 1945, to the date of the injury, Baskin was employed in ship repair work an increasing portion of his time:

Date	*Hours*
August 18, 1945	8
September 7, 1945	3
October 1, 1945	4
October 12, 1945	4
October 15, 1945	4
October 19, 1945	1.50
October 25, 1945	6.50
November 6, 1945	6
November 8, 1945	4
November 16, 1945	2.50
December 4, 1945	4
December 6, 1945	8.

There was oral testimony that Baskin might have been paid for repair work without actually going aboard vessels under repair. So from Baskin's payroll record one would conclude that his employment on repair work, while not a very large portion of his time, was something more than occasional or casual employment; it was distinctly embraced within his regular duties. If, in processing the claim, the employer and the insurance carrier had delayed payment while they sent attorneys and investigators to interview witnesses around the yard, they would have found (if the appellee's witnesses are to be believed) that while Baskin was engaged from time to time in the performance of maritime contracts, he rarely was sent aboard ship. If that is the kind of inquiry upon which jurisdiction turns, insurance carriers could hardly be blamed for withholding payment in these cases until there has been a claim, a hearing, findings of fact and an award by a competent tribunal—all that the appellee thinks is necessary to bind the workman to his election.

There is no reason why the United States Supreme Court should not have in mind the situation disclosed by the entire record. The appellee relies upon Rule 29(b) of the California Rules on Appeal, relating to appeals to the California Supreme Court. That rule has, of course, no application in this Court. Nor is it the practice in California (or anywhere else that we know of) to substitute for the record the statement of the case used by an intermediate appellate court in its opinion. As a matter of fact, the District Court of Appeal is not a fact-finding tribunal, and if it were seriously contended that the only facts open to consideration are those found below, then it would be more appropriate to refer to the facts as found by the Industrial Accident Commission.

II. Are the Questions Involved Substantial?

A. *The Bethlehem Steel case:*

We cannot share the confidence with which counsel for the appellee are able to state what was decided in the *Bethlehem Steel Co.* v. *Moore* [2] without having the benefit of an opinion from this Court. From the opinion of the Massachusetts court, one could make his choice among these possibilities:

1. There was not a sufficiently clear distinction between ship repair and ship construction work.

2. There is now an "occasional" employment rule, referred to in 80 N. E. 2d at 481 and relied upon by the appellee herein.

3. On the strength of the passage from the Massachusetts opinion, so extensively quoted by the District Court of Appeal in this case, one could conclude that the United States Supreme Court, in the *Davis* case, fathered a revolu-

[2] 335 U.S. 874 (1948), affirming 323 Mass. 462, 80 N.E. 2d 478 (1948).

tion which requires courts to dispense with the task of reasoning matters through in these cases.

We prefer the first explanation, because it alone is legally tenable. Although the appellee in its motion opposing jurisdiction has no difficulty in finding distinctions between the *Bethlehem Steel* case and *Emmons* v. *Pacific Indemnity Co.*,[3] or *De Graw* v. *Todd Shipyards Co.*,[4] the Massachusetts court thought the former case "very similar" and the latter case "similar". 80 N. E. 2d at 481. The context does not admit of the suggestion that this similarity consists of both cases having been within the "twilight zone".

Appellee refers to the Statement as to Jurisdiction filed by the Bethlehem Steel Company in *Moore's* case, wherein counsel argued that the decision therein would "govern all ship repair work." The statement was obviously mistaken; even the appellee has not taken occasion to argue that a case in which a workman regularly does repair work on vessels on navigable waters would necessarily be governed by either *Moore's* case or the present case.

We do not claim positive knowledge as to what *Moore's* case holds. The comment in Note (1950) 2 Stanford L. Rev. 536, 543-544, 546 is in some respects decidedly to the point on that. After quoting from the Massachusetts opinion in *Moore's* case, the note proceeds:

> "Patently nothing said in the *Davis* case warranted this interpretation of the twilight zone doctrine. The *Davis* opinion emphasized throughout the 'shadowy area,' the 'close case,' and 'marginal employment.' The sole aim of the new doctrine was to aid employees with unusual cases not previously passed upon by the courts. Clearly those claimants whose jurisdictional questions were answered by established authority were

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[3] 208 S.W. 2d 884 (Texas, 1948).

[4] 134 N.J.L. 315, 47 A. 2d 338 (1946).

not in the contemplation of the court when it evolved the new rule. They had only themselves to blame if they sought relief under the wrong act, and needed no twilight zone theory to assure them the certain remedy to which they were entitled. Yet apparently under the Massachusetts decision most of these claimants could take their choice and be assured of success regardless of prior authority against them.

"Although the *Moore's* decision was a jolt to those who had followed the *Jensen* problem, the real shock came later. When it was appealed to the United States Supreme Court, the case was affirmed in a *per curiam* memorandum decision. The absence of an opinion leads to speculation as to what the case really stands for. One possibility is that the Court failed to appreciate the full import of its holding. The decision as it stands apparently effects a sweeping change in workmen's compensation law; beyond this, it carries implications which reach the whole doctrine of uniformity. It seems highly doubtful that the Supreme Court would consciously achieve such a result by way of a memorandum decision. . . ."

The commentator went on to consider the *Baskis* case and the effect of the *Moore* case upon maritime workers generally and upon the general doctrine of uniformity in other fields. He concluded as follows:

"Much of the foregoing analysis has of necessity been speculative. The memorandum decisions which have apparently effected sweeping changes in the law can hardly be used as a basis for drawing categorical conclusions. They tend more to create an unsettled atmosphere. Until the Supreme Court spells out the change in its own words the full effect of these decisions will remain uncertain. Perhaps the original interpretation of the *Davis* rule will be reaffirmed. This would mean that the *Moore* case either was wrongly decided or fell within some exception not apparent on the facts and not pointed out by the Court. But if the

Massachusetts interpretation of the twilight zone theory is adopted, is there any logical stopping place short of giving every maritime worker his choice of remedy? Has the *Jensen* case been completely overruled, leaving state courts as free to apply local law as they were before 1917?

"It is highly probable that the Supreme Court will be called upon to explain the meaning of the *Moore* and *Baskin* cases in the near future. Until clarification is made, claimants, employers, lawyers, and the lower courts will be more in the dark than ever."

B. *The Question of Conflict with Parker v. Motor Boat Sales, Inc.*

The appellee misconceives our position in arguing that we reply upon "the rule of *Parker* v. *Motor Boat Sales, Inc.*"[5] That case has to do with the force of the jurisdictional findings of a Deputy Commissioner under the Longshoremen's Act; it further—and more important—makes the scope of the *Jensen* line of cases the scope of that Act. But in the *Motor Boat Sales* case this Court sustained a jurisdictional finding of the Deputy Commissioner by reiterating its established doctrine that the jurisdictional point turns upon what the workman is doing at the time of injury, not upon what he does upon other occasions.

C. *The "Doubt" in Baskin's Case, Apart from the Davis and Moore Decisions.*

So far as we can see from the argument under this heading by counsel for the appellee, the only ground upon which *Baskin's* case appeared doubtful was subjective and limited to his own counsel: "A host of decisions pro and con on that score have been carefully analyzed and discussed in the numerous briefs filed before the various state tri-

[5] (1941) 314 U.S. 244, 86 L. Ed. 184.

bunals." However, initially neither of the state tribunals manifested any doubt about the matter, and for reasons more fully set out in our Statement as to Jurisdiction, we think it evident that they were correct, apart from the inscrutable *Moore* case.

D. *Does the Twilight Zone Concept Diminish Rather than Increase the Difficulties Confronting the Land Workman Injured on a Vessel on Navigable Waters?*

The appellee's argument on this point commits the logical error of confusing the "twilight zone" concept of the *Davis* case, as it has been understood and administered by the courts since 1942, with the "twilight zone" concept as announced and applied in this case. The one has given a ready answer to a few doubtful cases; the other has made every case doubtful.

We have collected in Appendix A to this brief a list of the cases which we have found in the Decennial Digest dealing with the line between the Federal and State compensation acts during the years 1940, 1941 and 1942. The *Davis* case was decided in December, 1942.

It will be observed that 16 reported cases dealt with the problem in the three years preceding the *Davis* decision, and of these, only four resulted in decisions adverse to the employee. Undoubtedly there are other decisions unreported or not officially reported, but these figures clearly show the order of magnitude of the *Jensen* litigation during the years immediately prior to *Davis*.

To place the figures in perspective, it is important to bear in mind that the number of claims made under the Longshoremen's and Harbor Workers' Act has ranged from 80,659 claims for the fiscal year ending June 30, 1941, to 217,048 for the fiscal year ending June 30, 1944. See Appendix C. Considering the nature of the trades to which the

Federal Act applies, it is fair to say that almost all of these claims must have been made on behalf of workmen who were not seagoing personnel, but were rather land workmen in maritime employments who spend part of their time on ship and part of their time on shore. See 33 U. S. C. § 903.

In the period following the announcement of the *Davis* doctrine, the courts generally understood it as applying only to the few cases upon which decision was genuinely difficult.[6] It was, in consequence, possible to process many thousands of these claims with resort to litigation only in a trivial number of cases, reduced still further by the *Davis* rule as then understood. Appendix B, prepared in the same way as Appendix A, shows only three cases, of which but one went against the employee, during the years 1943, 1944 and 1945. Indeed, the volume of litigated cases was trivial and not, considered in the perspective of workmen's compensation claims as a whole, anything like so serious as has

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[6] This point was stated as follows by the Trial Referee in his opinion on rehearing before the Industrial Accident Commission:

"It is enough to say that the 'twilight zone' doctrine of the Davis case has never been extended to cover services in the repair of and on board a commissioned vessel. A mere reading of that decision makes it clear that it was never intended to overrule or even modify the authority of the guiding principle of the Jensen line of decisions (of which the Kierejewski and the Parker cases, supra, are illustrative). Its purpose was to *supplement* the Jensen rule within the limited field where no direct authority covered the particular factual situation and where practical minds might reasonably differ on whether or not the maritime feature in the particular case was so predominant as to 'materially interfere with the characteristic features or disturb the uniform application of the general maritime law' and thus forbid state action. The doctrine of the 'twilight zone' as enunciated in the Davis case, has not been extended by any subsequent decision of the Supreme Court, nor has it been generally invoked by the lesser Federal courts. It has been held to have no application to seamen in determining the jurisdictional question under the Jones Act. Norton v. Warner, 64 Sup. Ct. 747; Occidental Ins. Co. v. I. A. C., 149 Pac. 841. Indeed, the Davis case doctrine has been criticized as a 'quasi-legislative decision' and 'another of those hard cases which make bad law.' (De Bardelaben Coal Corp. v. Henderson, 142 F. 2d 481). See also Travellers Ins. Co. v. McManigal, 139 F. 2d 949."

been made out by some commentators even prior to the decision in the *Davis* case.

The difficulty with the extension of the *Davis* case reflected in the opinions of the state courts in *Moore's* and *Baskin's* cases is that virtually the whole field of the Federal Longshoremen's and Harbor Workers' Act has been turned into an arena inviting litigation to effect an election under the "twilight zone" doctrine. The real problem which this Court ought to consider is whether it wishes to introduce confusion, delay and litigation into the handling of many tens of thousands of cases in order to avoid it in at most two or three cases a year.

The appellee confidently asserts that insurance carriers will not litigate to force an election, because of the expense. This is a misconception. In cases where an employee ought to make an election at the outset, the carrier either will do nothing or merely file a controversion notice.

It may be suggested that these considerations are legislative rather than judicial. To that, we can only respond that the whole problem, from the *Jensen* case through the *Davis* case and down to the *Moore* case, is one created by the courts.

The hollowness of the suggestion that our arguments ought to be addressed to the legislature is manifest from the character of the *Davis* decision itself. For reasons pointed out in the concurring opinion of Mr. Justice Frankfurter and in the dissenting opinion of Mr. Chief Justice Stone, the decision cannot be supported on logical grounds in the conventional legal sense. The reliance on the presumption in favor of the constitutionality of state laws as applied adds nothing; of course there is such a presumption, but it must end somewhere or other, and by the explicit terms of the Federal Longshoremen's and Harbor Workers' Act, the point at which that presumption fails is the point at which

the Federal Longshoremen's and Harbor Workers' Act takes hold. 33 U. S. C., § 903(a) is specific:

> "Compensation shall be payable under this Act . . ., but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by State Law* . . ." (Italics supplied.)

And Section 905 is equally explicit:

> "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer . . ."

Having in *Parker* v. *Motor Boat Sales* construed these sections as incorporating the Jensen line,[7] the Court in the *Davis* case, on purely practical grounds, announced the twilight zone doctrine. If the Court is now to disregard practical considerations in this field, *Davis* should be overruled; the law of workmen's compensation ought not to be half practical and half doctrinaire.

The appellee refers to a comment in 4 N. A. C. C. A. Law Journal, page 174.[8] Its peculiar bias is evident in such statements as, "The employer or insurer in defending usually raises the question of 'wrong jurisdiction' whichever way the employee makes his choice." As indicated above and in Appendix A hereto, the point of "wrong jurisdiction" (or any other legal objection, for that matter) has been taken in only the most minute percentage of the cases. The same fact renders extravagant the remark that

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[7] See 314 U.S. 244 at 249-250, 86 L. Ed. 184 at 191; and see *Davis* v. *Dept. of Labor*, 317 U.S. 249 at 256, 87 L. Ed. 246 at 250.

[8] Before quoting from this periodical, one ought to mention its special bias as the professional publication of the National Association of Claimants' Compensation Attorneys.

"thousands upon thousands of cases happening in the twilight zone of amphibious employment are potential cases for the United States Supreme Court." The suggestion that whichever tribunal is asked to take jurisdiction should do so, made at the conclusion of this quotation, would carry more conviction if the appellee ventured any suggestion as to how the injured workman is to get one of these tribunals to take jurisdiction without sacrificing on the altar of litigation the inherent advantages of a clear, speedy and certain workmen's compensation remedy.[2] These cases ought never to get before a "tribunal"; to the extent that they do, the system has failed. They should be paid promptly and voluntarily.

In our Statement as to Jurisdiction, under the heading "Finality of Judgment", we stated that we anticipated that an award would be entered and hearing had in the Supreme Court of California in time to docket an appeal from the order upon the award itself concurrently with this appeal. The Industrial Accident Commission, however, has dropped the case from its calendar pending the determination of this appeal. We should have thought that the discontinuance

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[2] In the course of its brief, the appellee frequently mentions that the appellee is a young man, permanently disabled, who might be limited to a recovery of $7,500 if the Federal act should here be held applicable. This type of argument raises large questions of social justice which cannot be answered on the present record. The manner in which the social cost of industrial injury should be divided between the employer, public welfare agencies, and the employee himself is a problem upon which legislative opinion has differed. During the late war, many individuals found industrial employment who would, in normal times, have been unemployable. Without in any way suggesting that any financial award is genuinely compensatory for physical injury, we do suggest that there are many cases (of which this may well be one, judging from the record) where $7,500 would reasonably reflect the employer's fair share of the monetary loss resulting from permanent injury. More to the point, it was the limit fixed by Congress in the applicable law and the limit which the insurance carrier agreed to assume in the case of shipboard injuries to maritime workers. The Court may not frame its decision merely to defeat the will of Congress as expressed in the statute.

of further proceedings was in conflict with the order of the District Court of Appeal herein; but we are advised that counsel for the appellee does not propose to take any action to compel the Industrial Accident Commission to proceed with the case. Consequently, it will not be possible to docket concurrently herewith an appeal arising out of the final award of the Commission. At the same time, we note that the appellee raises no question as to the finality of the judgment appealed from.

Conclusion

Simplicity, certainty, and promptness are the keystones of any properly designed workmen's compensation system. In practice the tests developed under the *Jensen* line have enabled hundreds of thousands of cases to be processed with a trivial amount of litigation. Only in the rarest cases is there doubt as to whether an injury occurred (1) on navigable waters and (2) in maritime work. The reckless expansion of the twilight zone in disregard of established tests can only result in hurting the whole compensation system—not only employers and insurance carriers but especially the primary beneficiaries of the whole system, the injured workmen. Whether it is intended to introduce issues of degree as to "occasional" or "casual" employment or to bring the whole Federal system into a twilight zone, the problem is one of too much importance to be left in its present uncertain position.

Dated at San Francisco, California, November 2, 1950.

Respectfully submitted,

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Of Counsel.

APPENDIX A

Reported Cases Involving Question of Competing Jurisdiction of Federal and State Workmen's Compensation Statutes During Years 1940, 1941 and 1942

Personal Injuries

Arcand v. *Gutterson & Gould*, 16 A. 2d 697, 91 N. H. 194 (1941);

Asselin v. *Blount*, 65 R. I. 293, 14 A. 2d 696 (1940);

Brown v. *Aetna Casualty & Surety Company*, 135 Tex. 583, 145 S. W. 2d 171 (1940);

City of Brunswick v. *King*, 65 Ga. App. 44, 14 S.E. 2d 461, 760 (1941);

Dimino v. *Independent Warehouses*, 284 N. Y. 481, 31 N. E. 2d 911 (1940);

* *Faulhaber* v. *Industrial Commission of Ohio*, 64 Ohio App. 405, 29 N. E. 2d 58 (1940);

Heikkila v. *Steers, Inc.*, 261 App. Div. 1012, 25 N. Y. S. 2d 831 (erd Dept., 1941);

* *Hunt* v. *Basil Kenney Lumber Co.*, 141 Fla. 842, 194 So. 366 (1940);

* *Johnston* v. *Marshall*, 128 F. 2d 13 (C. C. A. 9th, 1942);

King v. *Glens Falls Ind. Co.*, 124 F. 2d 942 (C. C. A. 5th, 1942);

Parker v. *Motor Boat Sales*, 314 U. S. 244, 86 L. Ed. 184 (1941);

Puget Sound Nav. Co. v. *Marshall*, 31 F. Supp. 903 (W. D. Wash., 1940);

Orim v. *Oil Transfer Corp.*, 262 App. Div. 433, 29 N. Y. S. 2d 203 (3rd Dept., 1941);

* *Swan* v. *Baton Rouge Transportation Company*, 197 So. 191 (La. App. 1940);

Thomson v. *Bassett*, 36 F. Supp. 956 (W. D. Mich. 1940);

Zubik v. *Bethlehem Steel Co.*, 18 A. 2d 441, 144 Pa. Supp. 13 (1941).

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* Employee claim rejected.

APPENDIX B

Reported Cases Involving Question of Competing Jurisdiction of Federal and State Workmen's Compensation Statutes During Years 1943, 1944 and 1945.

Ford v. *Parker*, 52 F. Supp. 98 (D. Md. 1943);
Hammond v. *Albany Garage Co.*, 267 App. Div. 647, 47 N. Y. S. 2d 897 (3rd Dept., 1944);
* *Rhinehart* v. *Smith & Co.*, 14 So. 2d 287 (La. App. 1943).

APPENDIX C

Data from Annual Reports of Bureau of Employees Compensation

Fiscal Year Ending	Fatal and Non-Fatal Injuries Reported	All New Court Cases **
June 30, 1941	80,659	35
June 30, 1942	135,539	35
June 30, 1943	164,121	31
June 30, 1944	217,048	19
June 30, 1945	210,193	20
June 30, 1946	139,113	27
June 30, 1947	126,604	19
June 30, 1948	128,837	16
June 30, 1949	90,625	22

* Employee claim rejected.

** Only a small number of these related to jurisdictional questions—*e.g.*, 3 for the year ending June 30, 1945; 6 for 1944; 3 for 1942; 2 for 1941. Relatively few cases reach hearings before deputy commissioners—a total of 474 for the year ending June 30, 1949; 580 for 1948; 667 for 1947.